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JUDGES

OF

THE COURT OF APPEAL.

1936.

Viscount HAILSHAM, Lord Chancellor.

Lord HEWART, Lord Chief Justice of England.

Lord WRIGHT, Master of the Rolls.

Sir F. B. MERRIMAN, — President of the Probate, Divorce, and Admiralty Division.

Sir F. A. GREER,
Sir HENRY SLESSER,
Sir M. L. ROMER,
Sir W. A. GREENE,
Sir L. F. SCOTT,
— Lords Justices of the Court of Appeal.

JUDGES

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

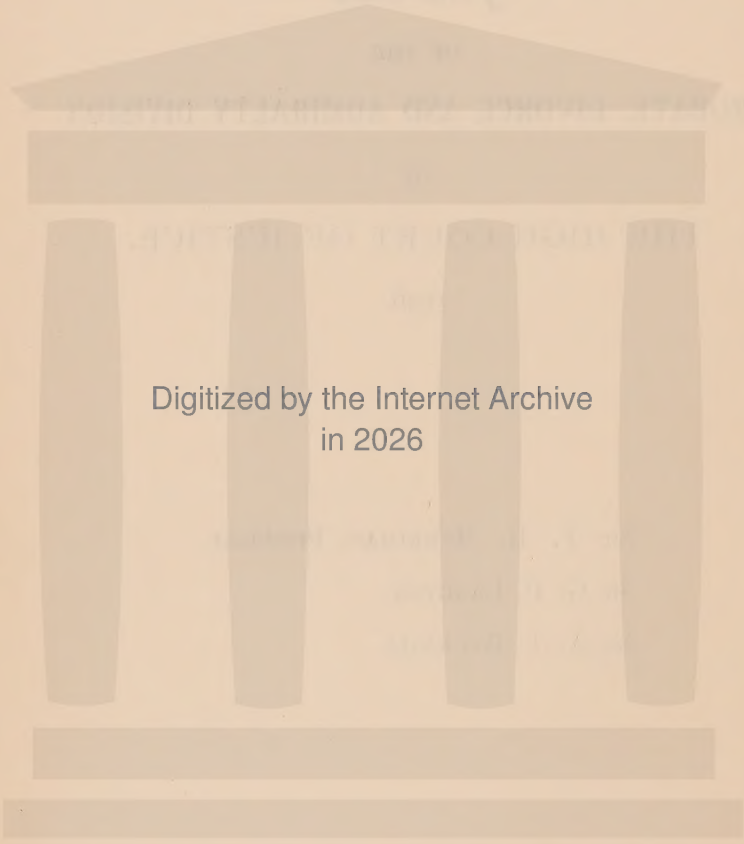
THE HIGH COURT OF JUSTICE.

1936.

Sir F. B. MERRIMAN, President.

Sir G. P. LANGTON.

Sir A. T. BUCKNILL.



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104	footnote (1)	[1907] 2 K. B. 534	[1917] 2 K. B. 534

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

BURNETT *v.* BURNETT.

1935

July 9, 19.

Divorce —" Marriage Settlement" — Jurisdiction to apply property settled—Definition of Settlement subject to the jurisdiction—Contemplation by settlement of a particular marriage the subject of a decree of divorce—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

A settlement executed without reference to any particular marriage, and not expressed to be in consideration of marriage, for the benefit of the settlor and any wife and issue of his for the time being in existence as the result of any marriage, with power to appoint in favour of a wife, and an appointment made under the power in favour of an after-taken wife, are not settlements giving the Court jurisdiction to apply the settled property under the powers of the Judicature (Consolidation) Act, 1925, s. 192, at the instance of the after-taken wife on her obtaining a decree for dissolution of marriage.

The section requires that there shall be a marriage, the subject of the decree, in contemplation and because of which the settlement has been made. *Hargreaves* v. *Hargreaves* [1926] P. 42 followed. *Janion* v. *Janion* [1929] P. 237 (*n.*) (1), and *Prinsep* v. *Prinsep* [1929] P. 225 distinguished.

(1) This case was heard in 1926 but was not previously reported.

1935

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CROSS-MOTIONS to confirm and to vary the report of a registrar on a petition for variation of settlements.

On October 22, 1934, a decree absolute was pronounced dissolving at her instance the marriage of Gwendolen Mabel Shelagh Burnett, the wife of Clive Norman Burnett, the husband, on the ground of his adultery. There were no children of the marriage, which took place on June 27, 1929. The husband had been previously married and divorced. His former wife and two children of his former marriage were still living. On June 18, 1925, during his former marriage the husband as settlor assigned certain investments to trustees upon a discretionary trust during the lifetime of the settlor to apply the income of the trust fund for the benefit of all or any one or more of the settlor and any wife and issue of his and any person who, if the husband were dead, intestate, would be entitled to the fund or the income thereof at the absolute discretion of the trustees and after the death of the settlor and subject to any life interest he might appoint to his wife upon trust as to both capital and income for children or more remote issue of the settlor by his then or any future marriage with a general power of appointment to the settlor in the absence of children attaining a vested interest in the fund and further a power was given to the settlor to appoint a life interest in all or part of the income to any surviving wife during the remainder of her life whilst she remained his widow.

On October 6, 1927, during his same former marriage the husband as settlor by a supplemental settlement brought further property into settlement on the trusts of the previous settlement. Neither of these settlements purported to be in consideration of marriage. By deeds of appointment respectively dated August 21, 1928, and September 26, 1928, the husband appointed in all half of the trusts funds after the death of him the appointor in favour of his two children, both of them daughters. Finally on June 24, 1929, on the eve of the now dissolved marriage of the respondent husband, he appointed the sum of 6000*l.* upon trust to pay the petitioner the income during her life if she should survive

him (being an appointment in excess of the power, which was to appoint an interest only during widowhood) and subject thereto in trust for the child (if any) of the now dissolved marriage. There was a further post-nuptial settlement dated December 31, 1929, of trust funds brought into settlement by the petitioner which was not affected by the proceedings.

The report of the registrar on the petition for variation followed *Hargreaves* v. *Hargreaves* (1), and was to the effect that the petition for variation should be dismissed on the ground that the settlements did not come within the category of settlements subject to the jurisdiction of the Court under the Judicature (Consolidation) Act, 1925, s. 192, and further reported that the appointment by the settlement of June 24, 1929, was made in exercise of the power given by the first two settlements and must stand or fall with them and was in excess of the power.

Both parties gave notice of motion: The wife to refer the report back and the husband to confirm the report.

Alexander Grant K.C. (*Hon. Victor Russell* with him) for the wife. This report should be referred back. This is clearly a settlement which the Court has jurisdiction to vary. The material statute is the Judicature (Consolidation) Act, 1925, s. 192. In *Prinsep* v. *Prinsep* (2) Hill J. applies to such a settlement the test: "Is it upon the husband in the character of husband or in [*sic*] the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. . . . . What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state." In *Janion* v. *Janion* (3) the contention was that the wife was not a party to the deed of settlement, which therefore was not within s. 192. But the President (Lord Merrivale P.) overruled the contention and made an order. It may be that the settlement, as its form shows, was a protective

(1) [1926] P. 42. (2) [1929] P. 225, 232.
(3) [1929] P. 235, 237.

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one, but the motive of the settlor is immaterial: *Prinsep* v. *Prinsep*. (1) As Hill J. says in that case: "If, in fact, it is a settlement on either husband or wife, or both in the character of husband or wife, it is wholly immaterial that it is prompted and stated to be prompted by affection only for one of them." The wording "any wife and issue of his" is an extensive definition, and a second wife is clearly within it. The only difference between the position of the respective wives is that in the case of the first wife the settlement was post-nuptial, while ante-nuptial in the case of this wife. *Hargreaves* v. *Hargreaves* (2) is distinguishable. In that case there was no contemplation in the settlement of any particular wife or marriage. To show how far the jurisdiction extends, a bond by a wife securing her husband an annuity (*Bosworthick* v. *Bosworthick* (3)) and a life policy effected by one spouse on the life of that spouse with a contingent interest of the other spouse in the policy moneys (*Gulbenkian* v. *Gulbenkian* (4)) were held to come within the section. The former of these decisions received the sanction of the Court of Appeal. The true view of the statute is that the intention of the Legislature is a wide one and is intended to operate in many cases where the dispositions might not appear to be settlements in strict conveyancing language. Lord Hanworth M.R. in *Melvill* v. *Melvill and Woodward* (5), quoting language used by Gorell Barnes J. and Sir Samuel Evans P., insists on the widest construction of the section in order to give the Court power to deal with all the cases of settlements coming before it whatever their form. It may be that there has been an excessive exercise of the power of appointment in favour of a wife, but this can be rectified by a direction to the registrar that the appointment should be varied by limiting the interest of the wife to widowhood. The report should be referred back to the registrar with the direction that in the opinion of the Court there is jurisdiction to vary the settlements and for further report on the merits, treating the petitioner on the basis of her having survived her husband.

(1) [1929] P. 225, 232.
(2) [1926] P. 42.
(3) [1926] P. 159; [1927] P. 64.
(4) [1927] P. 237.
(5) [1930] P. 159, 177.

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A. R. Ellis for the husband. The submission of the report should stand. It is not necessary to contend that there is not a settlement variable at the instance of the first wife. Such cases as *Janion* v. *Janion* (1) and *Melvill* v. *Melvill* (2) have no application. In both these cases the settlement was post-nuptial. And as Greer L.J. says in the latter case: "you cannot have a settlement after a marriage which has not some relation to marriage if it settles property on one of the parties to the marriage, and still more if it settles property on the children of the marriage." But in this case as regards the present petitioner the settlement is ante-nuptial. This case is covered by *Hargreaves* v. *Hargreaves*. (3) The settlement was not made in contemplation of any particular marriage. On the facts this is a stronger case than *Hargreaves* v. *Hargreaves*. (3) The husband was not free to contemplate a marriage at the date of the settlement. He was already married. *Hargreaves* v. *Hargreaves* (3) was approved in the Court of Appeal in *Melvill* v. *Melvill and Woodward* (4) on the point of non-application of the settlement to any particular marriage, i.e., to any particular marriage actually before the Court. If the original settlement is not capable of variation the appointment under it cannot be varied, and the result is that the trusts of the settlement must remain as at present while the respondent is alive.

L. W. Byrne for the trustees of the settlement. So far as concerns the second marriage the settlement was ante-nuptial and the question arises whether within the meaning of s. 192 the settlement can be said to be made on the parties whose marriage is the subject of the decree or whether it merely contemplates marriage in general. Romer L.J. from his judgment in *Melvill* v. *Melvill* (2), where he approves the definition of Hill J. in *Hargreaves* v. *Hargreaves* (3), appears to recognize this distinction. The further question arises whether the appointment of June 24, 1929, can be varied. The appointment cannot be affected by any order unless the settlement

(1) [1929] P. 235, 237.
(2) [1930] P. 159, 177.
(3) [1926] P. 42.
(4) [1930] P. 159, 172, 177, 178.

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of June 18, 1925, creating the power of appointment can be varied, and if it cannot be varied the result is that the only interest that the petitioner can have is during the period following the death of the respondent while the petitioner remains his widow, but the appointment specifies no limitation of widowhood and therefore exceeds the power.

F. L. C. Hodson for the children of the first marriage of the respondent. My clients were proper parties at the inquiry before the registrar, but were not made parties or represented. As their interest may be affected I object to the proposed variation without their representation.

Grant K.C. in reply.

Cur. adv. vult.

July 19. BUCKNILL J. This is a motion by Clive Norman Burnett, the respondent (husband) in certain divorce proceedings, to confirm the registrar's report on a petition by Gwendolen Mabel Shelagh Burnett, the petitioner (wife), to vary marriage settlements. There is a cross-motion by the petitioner to discharge the report of the registrar and to refer back the petition for further report on the footing that certain settlements were settlements within s. 192 of the Judicature (Consolidation) Act, 1925, which can be varied by the Court.

The petitioner was married to the respondent on June 27, 1929, and there is no issue of the marriage. On April 13, 1934, the petitioner obtained a decree nisi for the dissolution of her marriage, and the decree was made absolute on October 22, 1934.

On November 21, 1934, the petitioner petitioned for a variation of three settlements under the power conferred upon the Court by s. 192 of the Judicature (Consolidation) Act, 1925.

The words of the section are as follows: "The Court may after pronouncing a decree for divorce . . . . enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the

benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage."

The three settlements in respect of which the petitioner claims an order for variation are respectively dated: (1.) June 18, 1925. (2.) October 6, 1927. (3.) June 24, 1929.

No. 2 is a subsidiary settlement to No. 1. No. 3 is a deed of appointment executed under powers conferred by No. 1. The settlements arose in this way: On June 18, 1925, the respondent executed settlement No. 1. He was then in fact married to another woman, by name Rose Silvia, by whom he had two daughters: Lucy, born January 18, 1925, and Avril, born March 16, 1927. Under the terms of settlement No. 1 the respondent effected a settlement of his share of the residuary estate of a deceased uncle.

The declared trusts of the settlement, so far as is material to this motion, were as follows:—

"(3.) (*a*) Upon trust during the lifetime of the settlor to apply the annual income of the trust fund for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the settlor and any wife and issue of his for the time being in existence and any person or persons who would if he were actually dead intestate be entitled to the trust fund, as the trustees in their absolute discretion think fit.

(*b*) And after the death of the settlor and subject to any life or less interest appointed to his wife under the power for that purpose (thereinafter contained) the capital and income of the trust fund shall be held in trust for all or any one or more exclusively of the other or others of the child children or more remote issue by his present or any future marriage. . . . .

(*c*) If there shall not be any child of the settlor who attains a vested interest under the trust hereinbefore declared in default of appointment the capital and income of the trust fund shall be held in trust for such person . . . . as the settlor shall by deed . . . . or by will or codicil appoint.

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Bucknill J.

(4.) The settlor may from time to time . . . . appoint to or in favour of a wife who may survive him during the residue of her life while she remains his widow."

By the terms of the settlement No. 2 dated October 6, 1927, which was stated to be supplemental to No. 1, it was recited that the settlor had granted a mortgage on June 17, 1925, for 2000*l.* on his reversionary interest under his uncle's will, to secure a loan of 2000*l.* for the purpose of paying his debts, which loan was made on the express condition that the settlor would execute settlement No. 1. The settlor had since the settlement No. 1 incurred further debts which also were paid off on condition that he should bring certain further investments into the settlement. The settlor accordingly brought the said investments into the principal settlement to be held upon the same trusts, etc.

On August 21, 1928, and September 26, 1928, the respondent executed two appointments in favour of the two children of his first marriage.

On June 24, 1929, the respondent, who was by this time divorced from his first wife and was about to marry the present petitioner, executed a deed of appointment in pursuance of the powers conferred on him under settlements No. 1 and No. 2. The operating words of the appointment so far as is material to this case are as follows: " Whereas a marriage is shortly intended to be solemnized between the appointor and Shelagh Napier. . . . . The trustees shall after the death of the appointor stand possessed of the sum of Six Thousand Pounds part of the residue of the trust funds settled by the settlement . . . . upon trust to pay the income thereof to the said Shelagh Napier (if she shall survive him) during her life for her separate use . . . . and from and after the death of the survivor of the appointor and the said Shelagh Napier . . . . upon trust for the children (if any) of the appointor's marriage with the said Shelagh Napier. . . . ."

The learned registrar reported on the petition to vary settlements that he was of the opinion that none of the three settlements were settlements that could be varied under the powers given to the Court. In his opinion the first two

settlements might properly be regarded as post-nuptial settlements as regards the first marriage, inasmuch as they were made by the respondent whilst he was married to his first wife ; but neither of the first two settlements was made in contemplation or on account of the second marriage in respect of which it is sought to vary the settlements. The registrar considered that the case was almost identical with the case of *Hargreaves* v. *Hargreaves*. (1)

As regards the third settlement, the registrar reported that this was clearly an ante-nuptial settlement in contemplation of the second marriage ; but the appointment is under powers conferred by the first two settlements and must therefore stand or fall with them. The appointment also purported to confer an interest without limitation to widowhood, which was greater than the respondent is given power to appoint.

In objection to the registrar's report it was argued on behalf of the petitioner (the second wife) that the widest possible interpretation should be given to the word " settlement " in s. 192 of the Judicature Act, 1925, and that the motive which induced the settlor to make the settlement is of no importance. In support of this proposition the case of *Prinsep* v. *Prinsep* (2) was cited, where Hill J. said : " Whether a settlement is within s. 192 must depend on what it effects. If, in fact, it is a settlement on either husband or wife, or both in the character of husband or wife, it is wholly immaterial that it is prompted and stated to be prompted by affection only for one of them. On the question whether a settlement is a settlement within s. 192, the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed."

It was argued that the settlement of 1925 was clearly a post-nuptial settlement as regards the woman who was then the wife of the respondent, and was an ante-nuptial settlement as regards the woman who subsequently became his wife after his marriage with the first wife had been dissolved. In support

(1) [1926] P. 42.

(2) [1929] P. 225, 235.

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of this argument the cases of *Janion* v. *Janion* (1) and *Prinsep* v. *Prinsep* (2) were relied upon, and it was argued that the settlements in those cases were of the same ante-nuptial character as in the present case. In *Janion* v. *Janion* (1) the marriage was celebrated in 1914, and in 1915 the husband, who had married whilst he was a minor, came of age and executed the settlement which was the subject of the decision. He was, therefore, one of the " parties whose marriage is the subject of the decree " to quote the words of s. 192 of the Judicature Act, 1925. The settlement recited that the settlor was desirous of making a provision for his wife and issue in consideration of his natural love and affection for his wife. The trusts of the settlement included a provision that " after the death of the settlor " and subject to the life or other interest of any wife of his the capital and income were under certain conditions to be held in trust for all or any of his children by any marriage, etc. Provision was made under the settlement for appointment by the settlor in favour of any wife who might survive him. There was one child of the marriage. In due course the wife obtained a decree nisi dissolving her marriage on the ground of the husband settlor's adultery, and filed a petition to vary the settlement, and asked (inter alia) that the settlor's power to appoint to a future wife or children should be extinguished in the case of any future wife that he might marry in her lifetime.

The registrar in his report on the petition reported that there was no jurisdiction to vary the settlement, because it did not come within s. 192 of the Judicature (Consolidation) Act, 1925. It was argued on behalf of the husband that the settlement was not a post-nuptial settlement but a spendthrift settlement. Lord Merrivale in the course of his judgment varying the report and holding that the settlement did come within s. 192 of the 1925 Act said: " An assignment of property to a trustee in which the cestuis que trust are the wife then in being, a future wife if there be one and any child of the marriage, as well as the husband and father of any children extends not only to but beyond the lifetime of the husband. These being the trusts, I find it impossible to say

(1) [1929] P. 237 (*n*). (2) [1929] P. 225.

that this is not a settlement which is within the provisions in the successive statutes and placed by those provisions under the control of the Court. It is the effect which must be regarded. It is the interest of the wife and child or any wife or any child or children and as to those the Legislature, as I understand, intended to protect them from being impoverished by reason that a decree of divorce had become necessary."

In the present case it was argued that the use of this language by Lord Merrivale indicated that he considered that a settlement of this nature made by a husband was not only a post-nuptial settlement as regards the wife in being, but an ante-nuptial settlement as regards any wife in the future, so as to entitle any wife of the settlor to apply for a variation of the settlement. If this reading of s. 192 of the Act is right the legal position of the various beneficiaries, wives and children, arising from a possible series of variations of the settlement which would be limited only by the possible number of wives of the settlor, would tend to become extremely complicated.

It is to be noted that in the case of *Janion* v. *Janion* (1) there was a wife in being at the time when the settlement was made, that the settlement was expressly made for the purpose of making provision for her, and that it was the dissolution of her marriage which prompted the application to the Court to vary the settlement. No second wife in fact appeared upon the scene, and to this extent the case differs entirely from the case which is now before me.

In *Prinsep* v. *Prinsep* (2) the question of variation of settlements arose upon the dissolution of marriage of a husband and wife on the ground of the husband's adultery. There was one child of the marriage. The decree absolute was made in 1928, the parties were married in 1912, and by an ante-nuptial settlement made in 1912 certain trust funds were brought into settlement by the mother of the husband upon trust to pay the income to the husband for life until he should become bankrupt, etc., and thereafter on certain protective trusts and after his death to pay the income to

(1) [1929] P. 237 (*n*). (2) [1929] P. 225.

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the wife so long as she remained a widow. There were provisions for resettlement of trust funds upon an after-taken wife of the husband. In August, 1920, the mother of the husband by deed brought into settlement certain further funds in trust to apply the income at the discretion of the trustees for the benefit of the husband and his issue by any marriage and any wife of his . . . . , and powers were reserved to the husband to appoint income for her life to any wife of his. . . . .

The question for the decision of the Court was whether the deed of the mother of the husband made in August, 1920, was a post-nuptial settlement within s. 192 of the Judicature (Consolidation) Act, 1925. It was argued on behalf of the trustees of the settlement that the settlement of August, 1920, was a settlement by the mother on her son and had nothing to do with his marriage, and was not a settlement in consequence of the marriage and was, therefore, not a " post-nuptial " settlement. Hill J. decided that the settlement of August, 1920, was a " post-nuptial " settlement. Hill J. said: " What does matter is that the settlement should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state. Is the settlement of that character? In terms it has in contemplation Mr. Prinsep, who it designates ' principal beneficiary.' But it also has in contemplation his then wife Mrs. Prinsep and any future wife and his child and any future children."

It was argued that these words used by the judge indicated that in his view the settlement in question in that case was not only a post-nuptial settlement as regards his then existing marriage, but was also an ante-nuptial settlement as regards any future marriage. It was a settlement which " provided for the financial benefit of one or other of the spouses and with reference to their married state."

Here again it must be pointed out that in *Prinsep* v. *Prinsep* (1) the motion to vary the settlement was in respect of the injured wife, who was married to the husband at the

(1) [1929] P. 225.

time when the settlement was made. It is true that "any wife" is mentioned in the settlement and that the expression "married state" is quite general. If in *Prinsep* v. *Prinsep* (1) the husband had married again and had again been divorced and the second wife had then sought to vary the settlement of August, 1920, in her favour the same point would have arisen that has arisen in the present case. But as it is, the case of *Prinsep* v. *Prinsep* (1) is no direct authority on the question I have to decide.

In *Melvill* v. *Melvill* (2) the husband obtained a decree for the dissolution of his marriage on the ground of his wife's adultery. There were two children of the marriage. The decree nisi was pronounced on March 26, 1928, and was made absolute on October 22, 1928. On December 12, 1928, the wife married the co-respondent in the suit. On December 30, 1927, after the divorce petition had been filed and the case had been set down for trial, the wife executed a settlement on herself for life with remainder to any children of hers. The settlor was described as the wife of the petitioner in the divorce suit, as she in fact was, and the consideration was expressed to be the natural love and affection of the settlor for the two children of her marriage. The settlor also had a power to appoint the income and not exceeding a moiety of the capital of the trust fund to any surviving husband. Upon a petition by the husband to vary the settlement, Bateson J. held that it was not a 'post-nuptial' settlement within the meaning of the section, and said that he was satisfied that the settlement was made by the wife in order to protect if she could any money she might be entitled to, from being touched in any way by her then husband. Bateson J. said: "In my judgment it is not a settlement on the wife in her character as a wife, nor is it in reference to the married state of the spouses. It is a settlement upon the wife for herself and for any children she may have in future and with power to appoint to any husband she may take, made at a time when she knew perfectly well that the only possible person that she at that time could think

(1) [1929] P. 225. (2) [1930] P. 99, 109, 159.

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of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could." The judgment of Bateson J. was reversed on appeal, and the settlement was held to be a post-nuptial settlement so far as the then existing marriage was concerned. I have referred to the case because it seems to me that if the argument of the petitioner is right in the present case the co-respondent who became the second husband in *Melvill* v. *Melvill* (1) might also have claimed a variation of the settlement as ante-nuptial, if he too subsequently divorced the wife, and, therefore, the settlement would be post-nuptial as regards the first and at the same time ante-nuptial as regards the second marriage. I cannot think that the Legislature ever intended s. 192 of the Judicature (Consolidation) Act, 1925, to have such a result as that.

It was argued on behalf of the wife in the present case that the word " parties " in s. 192 has been decided to include one of the parties and that if the settlement refers in terms to any marriage of one of the parties it is an ante-nuptial settlement as regards any such marriage, either in being or in the future. In other words a settlement may be made upon a woman in contemplation of a possible series of marriages by her with the aid of death or divorce, and in such a case the settlement is an ante-nuptial settlement within the meaning of s. 192 in the case of each marriage of the series.

On the other side on behalf of the husband in support of the registrar's report it was argued that the reasoning of Hill J. in *Hargreaves* v. *Hargreaves* (2) applied to this case.

In *Hargreaves'* case (2) on April 28, 1914, a man made a settlement of certain property upon trust, subject to the life interest of his mother, to pay the income to the settlor for life and after his death in favour of his children. The settlement contained a power for the settlor to appoint for the benefit of any wife, but contained no other reference to the marriage of the settlor. A month later the settlor entered into a deed of appointment in which after reciting that a marriage had been

(1) [1930] P. 99, 159. (2) [1926] P. 42, 45.

arranged between himself and his future wife he appointed to her after marriage a certain sum during the continuance of the coverture. The marriage took place on June 9, 1914, and there was one child born January 5, 1920. On May 6, 1924, a decree nisi was granted upon the petition of the wife, who subsequently applied to vary the settlement.

Hill J. confirmed the report of the registrar that the appointment should be varied by directing the trustees to pay 500*l.* a year to the petitioner for life instead of during coverture, but he refused to vary in the wife's favour the original settlement of April 28, 1914.

Hill J. in the course of his judgment said: "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning. The judgment of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (1) shows that it has not a wider meaning than that." This passage was quoted with approval by Romer L.J. in *Melvill* v. *Melvill.* (2)

Applying this explanation of the meaning of "ante-nuptial settlement" to the case now before me, the principal settlement, in order to be "ante-nuptial" within the meaning of s. 192 of the 1925 Act, must be made in contemplation of or because of a second marriage, although the settlor at the time when the settlement was made was already married. I do not think that s. 192 was intended to cover such a case as this. In order to bring the section into operation, there must be a marriage which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made. I do not think that the Legislature intended a spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement which is "ante-nuptial" as regards

(1) [1912] P. 222. (2) [1930] P. 159, 178.

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such contemplated marriage, although at the time being he or she is married and, therefore, incapable of entering into a second marriage at that time.

In my view the settlements of June 18, 1925, and October 6, 1927, were not made because of the marriage which is the subject of the decree in this case. If it was a settlement made in " contemplation of or because of marriage " to quote the words of Hill J. in *Hargreaves* v. *Hargreaves* (1) it was made in contemplation of or because of the marriage between the settlor and his first wife, which was subsisting at the time of the settlement in question.

A second point taken on behalf of the wife on this petition to vary was that the appointment under settlement No. 3 by the settlor on his second wife under the powers conferred by the original settlement No. 1 was clearly an ante-nuptial settlement within s. 192. I think that this is so, but in my view the Court has no jurisdiction under s. 192 of the Judicature Act, 1925, to vary an appointment in such a way that in the result the principal settlement is also varied although that settlement is not within s. 192.

Thus in this case the settlor under the principal settlement only had power to appoint to a wife who may survive him while she remains his widow. In other words it only covers a period of time which commences with the death of the settlor. But if the appointment is varied by varying the period of the appointment to her life whilst she is single and thereby makes the period start during the settlor's life, then the principal settlement is thereby itself varied, because the appointment covers a different period of time from that which the principal settlement allowed.

For these reasons I confirm the report of the registrar. Costs of all parties out of the fund except so far as appointed to the children of the first marriage.

Solicitors for the petitioner: *Radcliffes & Hood, St. Barbe Sladen & Wing.*

(1) [1926] P. 42.

Solicitors for the respondent and trustees : *Francis Miller & Steele.*

For the children of the first marriage : *Gamlen, Bowerman & Forward.*

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SIMON *v.* SIMON, HOGARTH, PRESTON AND SHAW (HUNTLEY WALKER AND NURICK INTERVENING).

1935

Oct. 18, 22, 24, 25, 29.

Divorce—Evidence—Declaration of deceased person in course of duty—Admissibility.

A husband petitioning for divorce was counter-charged by his wife with adultery with a named woman, who had at a material date been examined by a surgeon as to her sexual condition. The surgeon gave a certificate and in addition made memoranda of the case. He died before the trial of the present counter-charge. On these documents being tendered in evidence :—

Held, that the circumstances founded no exception to the general rule that evidence must be given in open Court and subject to cross-examination. The exception is limited to cases where it was the duty of the deceased to perform a particular act and record having done so. In the present case the surgeon had no duty to perform which brought him within the exception, and the documents were therefore inadmissible.

HUSBAND'S PETITION for divorce.

The petitioner, V. A. Simon, charged his wife, Clara Simon, with adultery with three co-respondents : F. G. Hogarth, A. Preston, and P. A. Shaw. The co-respondent Shaw did not file an answer. The respondent and the co-respondents Hogarth and Preston defended the suit. The respondent and the co-respondent Hogarth, along with other defences, counter-charged the petitioner with committing adultery with two named women, both of whom intervened in the suit and denied adultery. Both petitioner and respondent admitted adultery and asked for the discretion of the Court to be exercised, the respondent praying by a cross-claim for dissolution of the marriage.

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Melford Stevenson and *Earl of Drogheda* for the petitioner.

Sir Patrick Hastings K.C. and *A. Richard Ellis* for the respondent.

Birkett K.C. and *Talbot Dyer* for co-respondent Hogarth.

G. C. Tyndale for co-respondent Preston.

F. L. C. Hodson for J. Nurick, one of the interveners.

Joan Nurick, one of the women intervening on the counter-charge of adultery with the petitioner, which she denied, relied as part of her case on a certificate given by a surgeon who had examined her at a material date, though not in respect of the present proceedings. Certain memoranda of the case made by the same surgeon were also tendered. The surgeon had died before the hearing.

Evidence was given by a solicitor who had taken the woman to be examined by the surgeon and of the assistant of and successor to the surgeon who produced the memoranda and proved the handwriting of the certificate and of the memoranda.

F. L. C. Hodson for Nurick. It was the duty of the surgeon to record at the time the results of his examination. The legal result appears from the dictum of Vaughan Williams L.J. in *Mellor* v. *Walmesley* (1): "If it was his duty to record those matters at the time, and he in fact did so contemporaneously, I think the rule as to admissibility applies." Even, supposing that the memoranda apart from the certificate were made for the convenience of the surgeon only and fall within the decision in *Mills* v. *Mills* (2) as to a doctor's case book, the certificate remains. That was clearly given in the course of duty. The obtaining of it was the sole purpose of the interview with the person who gave it and the dictum in *Mellor* v. *Walmesley* (1) applies.

[BUCKNILL J. Is the certificate anything more than the expression of an opinion by a professional man ?]

Sir P. Hastings K.C. contra. The certificate falls short of the qualifications necessary for its admission. It was not

(1) [1905] 2 Ch. 164, 168. (2) (1920) 36 Times L. R. 772.

given in the course of duty. It was not contemporaneous with any occurrence that there was a duty to record: *Smith* v. *Blakey* (1); *Mercer* v. *Denne*. (2) Unless these qualifications are present the ex parte report of any person employed to make it would become admissible without cross-examination simply by reason of his death.

BUCKNILL J. As this point is one of some importance I wish to give my reasons for my decision. The evidence is that in 1929 a solicitor took Miss Nurick to see a surgeon in order that she might be examined for a particular purpose. She was examined for that purpose. The surgeon made notes of the case as surgeons usually do, and at the close of the examination handed to the solicitor a piece of paper or certificate which presumably embodied the result of his examination and his opinion thereon. Now, unfortunately, the surgeon has died, and it is sought to put in evidence both the notes on the case made by him and the piece of paper on which he wrote. The rule is that evidence must be given in open Court and the witness be subject to cross-examination. There are certain exceptions, and one is in connection with writings made by a deceased person in certain circumstances. Those circumstances were stated by Lush J. in *Smith* v. *Blakey* (1) as follows: "We ought to be extremely cautious how we extend the exception which makes hearsay evidence against third persons. The general rule is that evidence ought to be on oath, and subject to cross-examination by the person against whom it is given. The admissibility of declarations by deceased persons is limited to a very few cases. And when an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons: but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it."

In this case I cannot see that the surgeon had any duty

(1) (1867) L. R. 2 Q. B. 326, 335. (2) [1905] 2 Ch. 538.

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to record the result of his examination or to hand to the solicitor a writing stating what that result was. No doubt he did that in pursuance of a contract as any one would give an opinion in pursuance of his profession. I do not consider that this case comes within the exception, and I think that my view is supported by Lord Merrivale's decision in *Mills* v. *Mills*. (1)

[The learned judge reviewed the facts in *Mills* v. *Mills* (1), in which entries in a doctor's case book were held inadmissible, and continued:] Lord Merrivale (then Sir Henry Duke) refused to receive the doctor's entries in evidence and relied on *Hope* v. *Hope* (2), in which the rule is stated in this way: "To make such entries admissible it must be shewn that they were made in pursuance of some duty on the part of the person who made them." As regards the present case, as counsel has pointed out, the doctor might not have given his opinion in writing, but merely verbally, and if I were to admit this document I should be extending the rule in a very serious way. It would be evidence which no one could deal with on cross-examination. I am sorry to reject anything which might throw light on this case, but as the objection is taken I must uphold it.

[The hearing continued, and resulted in the co-respondent Preston being dismissed from the suit with costs and the intervener Nurick without costs. A decree nisi was pronounced on the petition at the instance of the petitioner, maintenance for the respondent wife being adjourned into chambers.]

Solicitors for the petitioner: *Gordon, Dadds & Co.*

Solicitors for the respondent: *Pettiver & Pearkes.*

Solicitors for the co-respondents Hogarth and Preston: *S. F. Miller & Miller.*

Solicitors for the intervener Nurick: *Daybells.*

Solicitors for the intervener Walker: *Arnold Carter & Co.*

(1) 36 Times L. R. 772. (2) [1893] W. N. 20.

R. M. M.

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1935
Nov. 15.

Shipping—Collision—Towage Conditions—"Whilst towing"—Tug in "position to receive orders direct from the hirer's vessel to pick up ropes"—Construction of U.K. Standard Towage Conditions.

Under a contract of towage a tug was engaged to assist a ship from a wharf to buoys further down the river. The precise time at which the towage was to begin was not defined, but it was intimated that the tug should be in attendance about 11 A.M. About 10.55 A.M. the tug arrived; but she was travelling too fast, failed to reverse her engines in time, and struck the ship. At the time of the collision the ship had not finished discharging; those on board her were not ready to give orders to pick up towing ropes; and those on the tug were not expecting such orders and were only concerned in trying to avoid the collision.

The tug owners contended that the collision happened "whilst towing," within the meaning of that phrase in the conditions of the contract of towage (the U.K. Standard Towage Conditions) under which it was admitted that the tug would be exempt from liability.

In clause I. of the conditions the meaning of the phrase "whilst towing" is stated as follows: "For the purpose of these conditions the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner. . . . .":—

Held, that the Towage Conditions had not begun to apply; that it would be putting an unreasonable construction on the words to hold that the collision occurred "whilst towing" merely because the tug was within hailing distance and therefore physically "in a position to receive orders direct from the hirer's vessel to pick up ropes"; that, even if regarded solely from the tug owners' point of view, the tug must at least be in a position to receive and comply with the orders; but that the conditions ought to be read with reference to both parties, and that until the reasonable moment had come at which orders might be expected to be given from the ship the tug could not be said to be "in a position" to receive them.

THIS action, which in form was for an order to set aside an admission of liability filed in a collision action, in substance raised the question of the construction of a clause in the United Kingdom Standard Towage Conditions.

The plaintiffs were the owners of the steam tug *Kenia*; the defendants were the owners of the steamship *Uranienborg*.

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According to the statement of claim, on March 2, 1935, the defendants, through their agents Lambert Bros., Ld., engaged two tugs belonging to the plaintiffs to tow the *Uranienborg* from Bellamy's Wharf, River Thames, to Swanscombe Buoys on the afternoon tide of March 4. It was provisionally arranged that the tugs should be in attendance on the ship at 11 A.M., and the plaintiffs alleged that this arrangement was confirmed on the morning of the 4th. The tugs were engaged upon the terms of the United Kingdom Standard Towage Conditions, which contained (inter alia) the following clauses:—

"I. For the purpose of these conditions the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner. . . . ."

"III. The tug owners shall not, whilst towing, bear or be liable for damage done by . . . . the tug or done . . . . to the hirer's vessel arising from any cause, including negligence at any time of the tug owners' servants or agents."

The plaintiffs alleged that in accordance with their instructions the tugs *Tanga* and *Kenia* proceeded to Bellamy's Wharf on March 4, and that, while manœuvring to go alongside the *Uranienborg*, the *Kenia* came into collision with her. On March 5 an action Fo. 41, 1935, U No. 215 was begun by the present defendants against the present plaintiffs, and on March 6 liability for the collision and damage was admitted by the present plaintiffs in that action, and the admission of liability was filed in the registry.

The admission was made on the instructions of the managing director of the plaintiffs' company, who was out of town and was merely informed on the telephone that the *Kenia* had collided with the *Uranienborg* while the latter was lying at Bellamy's Wharf. Neither he nor (as was subsequently admitted) the owners of the *Uranienborg* were aware that the *Kenia* had been engaged to attend upon the *Uranienborg*. (1)

(1) The statement of claim only alleged a unilateral mistake of fact, but by leave of the Court at the hearing the claim was amended to cover a mutual mistake of fact.

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The plaintiffs alleged that the Towage Conditions afforded a complete defence to the action brought by the owners of the *Uranienborg*, and claimed (i.) a declaration that they were not liable to the owners of the *Uranienborg* for the damage, and (ii.) an order setting aside the judgment or admission of liability filed in the action Fo. 41.

By their defence the defendants denied that they had engaged the tugs as alleged prior to the collision, but the allegation material to the present report was that in any event the terms of the Towage Conditions were irrelevant and that the statement of claim disclosed no right to any relief, inasmuch as when the *Kenia* approached and collided with the *Uranienborg* the ship was still discharging her cargo and the pilot had not yet come on board.

Cyril Miller for the defendants. The time had not arrived when the Towage Conditions could be held to apply.

[He was stopped.]

Owen Bateson for the plaintiffs. The Towage Conditions must be regarded, not from the shipowners' but from the tug owners' point of view, for whose protection they were expressly framed. A tug has to go close alongside for orders, and her master does not know exactly when he will receive them. The *Kenia* had arrived within hailing distance of the ship and physically was "in a position to receive orders direct."

[THE PRESIDENT. On that argument the tug could run amuck once she was inside the barge roads outside the ship, because she would be within hailing distance.]

In fact the tug was under control until she got very close to the ship; she was manœuvring in the neighbourhood in expectation of orders. The fact that those on the ship were not ready to give them is immaterial; all that matters is the position of the tug, she was there at a reasonable time, just before 11 A.M., in obedience to instructions, and prepared to receive orders whenever they might be given; and the collision accordingly occurred "whilst towing" within the meaning of that phrase as defined quite unambiguously in clause I. of the conditions.

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THE PRESIDENT (SIR BOYD MERRIMAN). This is an action by the owners of the steam tug *Kenia*, the substance of which is a claim to be allowed to recall an admission of liability which has been filed and consequently has the effect of a judgment. The ground is that the admission was made under a mutual mistake of fact and that once that mutual mistake is cleared away, there is a defence to the action. It is now conceded that there was a mutual mistake of fact—namely, that both parties at the time when the admission of liability was called for and given were under the misapprehension that there had not been in fact a contract of towage.

The original claim was in respect of damage by collision between a ship lying alongside a wharf and the *Kenia*, which, with another tug, was going in the ordinary course of events to assist her in going down river. Of course if there had been no contract of towage at the moment of collision no sort of exemption would apply, and it was under that misapprehension that the admission of liability was made. That is conceded, and I have allowed the pleadings to be amended so as to give full effect to that admission. On the assumption that the amendment has been made (because the pleadings in fact only show a unilateral mistake of fact) the point of substance then emerges. If there was a contract of towage, it is conceded that the United Kingdom Standard Towage Conditions apply, and the question then is whether this collision occurred in circumstances which were covered by those conditions. If so, I do not think it is disputed that the *Kenia* would be exempt from liability. If, on the other hand, the Towage Conditions do not apply I have not heard any argument to the effect that liability would not attach to the *Kenia*.

The circumstances are these: the steamship *Uranienborg* was lying alongside Bellamy's Wharf, starboard side to the wharf, and was discharging. She was expected to leave the wharf and proceed down to Swanscombe Buoys on Monday, March 4. On the Saturday negotiations were entered into by telephone between the tug owners and the agents of the ship for the towing arrangements, and it was left that two tugs were to be provided; that the time would probably be

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11 o'clock; and that the time should be verified on Monday morning by a telephone conversation direct from the City office of the tug owners to Bellamy's Wharf, so that the tugs should be able to get to the ship in ample time to perform the towage operation when required.

It is not now disputed that there was a completed contract. I do not think that there ever was an actually defined time at which the towage was to begin; but, on the other hand, I think that it was made quite clear that the towage would start some time after the ship had finished discharging, and on the afternoon tide of March 4, with an intimation that the tugs had better be in attendance about eleven. No point is made that there was not a completed contract, all that is said is that there was no exact time, and I think that is right. In fact the ship did not finish discharging until about 11.30, and at the time when the collision occurred, which was about 10.55, the pilot had not come on board.

Now I find the following facts. I find that the companion tug, the *Tanga*, arrived at Bellamy's Wharf before the *Kenia*. The *Tanga* arrived about 10.30, came up to the ship, asked for orders, and was told that they were waiting for the pilot—whose presence was necessary before they could have moved at all—and boatmen; and although I have not had any direct evidence about this, I assume that the boatmen would be there to assist in unmooring. The master of the *Tanga* made his tug fast to one of the buoys off the wharf, and she was already hanging on to that buoy when the *Kenia* was seen coming up about a quarter of a mile away. The *Kenia* came up in accordance with orders given by the tug owners as the result of a telephone conversation which was initiated about five minutes past ten, and as the result of the master asking for orders, but strictly in accordance with the arrangement which had been made on the Saturday on the telephone. After he had telephoned about his orders, the man in the office telephoned to Bellamy's Wharf to find out whether the *Uranienborg* was shifting on Monday afternoon's tide, and her agents said she was shifting at 11 o'clock and that they had better hurry as there was not much time. The *Kenia*

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therefore undoubtedly was going up as one of the two tugs to perform this service. She came up at what is admitted to be about 6 knots, or something between 7 and 8 knots over the ground, the tide being flood. Outside the *Uranienborg* there was a line of buoys—a barge tier—and the *Kenia* had to make her way through those. I am satisfied that she came through much too fast, and, as the result of her excessive speed combined with the failure to give orders to reverse her engines in time, she ran into the *Uranienborg* at approximately a 4 point angle and did very severe damage.

It is said that in these circumstances she is exempt from all liability because she is covered by the Towage Conditions, and the whole point (as both sides agree) is whether, within the meaning of the phrase in clause I., she was in collision " whilst towing." The meaning of the phrase " whilst towing " is given in clause I. in the following words : " For the purpose of these conditions the phrase ' whilst towing ' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the hirer's vessel to cast off ropes or lines have been carried out or the tow rope has been finally slipped and tug is safely clear of the vessel, whichever is later. Towing is any operation in connection with the holding, pushing, pulling, or moving of the ship." I need not pay any attention to that last sentence for the purpose of the present case, because nobody disputes that the operation, if it had begun, was one connected with the moving of the ship. The point is whether this period had commenced.

It is admitted, and also I am clearly of opinion, that " the tug " means a tug under contract. It may be of course that the contract only begins by the acceptance of the offer of one among many tugs which are hovering round a ship, but I think that the tug is assumed to be one which is there in pursuance of a contract of towage. The contract may of course be made at the moment when the towage is about to start, or it may be made days or weeks beforehand. The

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crucial words are "is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner." Taking the last words first, there ought to be no difficulty in ascertaining when that moment occurs. The rope either has, or has not, been passed to or by the tug. Once the rope has been passed there is no further room for argument as to whether the rope is taut so that the actual process of moving or towing the ship has begun. I think that those words, which are the alternative to the crucial words, are important in construing the crucial words, because in effect what Mr. Bateson has argued is this; If it is shown that the tug was there because of a contract of towage and that she is within reasonable hailing distance of the ship at a reasonable time in reference to the contract of towage, the words are satisfied. Her physical position is within hail, and that is enough. She is there waiting the moment when somebody gives her the orders which she is prepared to receive. She will receive them direct because she is within hailing distance, and there is no more to be said about it.

I do not think that that is a reasonable interpretation of the words. Of course if that be the only possible meaning of the words, then even if they may appear to lead to an absurd conclusion that cannot be helped, and effect must be given to them. But I do not think that that is what this clause means. Whether one looks at the alternative to which I have referred, or whether one looks at the corresponding point of time at which the towage ends, I think one is driven to the conclusion that something narrower than that is meant. I doubt whether the word "position" is only used in the sense of local situation, I think it involves also the conception of the tug being herself in a condition to receive and act upon the orders. But however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or lines—not orders generally, but those specific orders, and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive them.

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On the facts of this case I should be prepared to hold that, even if one were bound to the conclusion that all that matters is the physical position of the tug, the moment had not arrived. There was nobody on board the *Uranienborg* who, at the moment of *Kenia's* arrival, was preparing to give orders to take or receive, as between the ship and the tug, the ropes or lines. They had not got to that stage, they were not thinking of it. I have seen the officer whose duty it would be to superintend those operations. He had not got anybody standing by; the ship had not finished discharging; he had already told the other tug that neither the pilot nor the boatmen had come; and the other tug was lying off some 300 feet away at a buoy. Mr. Bateson argues that the *Tanga* quite plainly was in a position to receive orders to pick up ropes or lines. This is true in the sense that she was within 300 feet and within hailing distance, but in no other sense; she knew that the time was not ripe and was acting accordingly. There is not a shred of evidence from the *Kenia* that anybody, from the master downwards, was even thinking in terms of ropes and lines at the material time. Certainly they had come there in order to be available for the towing whenever the towing began. At the moment that this collision occurred they were not thinking about, and had not begun to expect, an order to pick up ropes or lines. On the contrary, all that the master was thinking of at that moment was the correction of his own errors in going through those barge tiers much too fast and in trying to avoid collision.

Whether as a matter of construction of the conditions or on the facts, I find it impossible to hold that at the critical moment this tug was in a position to receive orders with regard to ropes or lines. But Mr. Bateson says that on his argument that does not matter; he says that although that may be so at that moment, I have to look, at the very latest, to the moment when the tug turned out of the channel—and possibly earlier, because she was within hailing distance before then—but at any rate at the moment when she turned out of the channel between the buoys in the barge roads, and at that moment she was in a position to receive orders. Therefore

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the towage had begun, and accordingly the fact that at some later moment those on board her are not thinking about ropes or lines at all and are only thinking of correcting their own carelessness, is irrelevant. The towing has begun ; the moment has not come when the tow ropes have been finally slipped and the tug is safely clear ; therefore she is subject to all the exemptions. I think that that construction is simply making nonsense of these conditions. In my opinion the least that is involved in arriving at the moment when the period commences is that the tug herself at any rate should be able to show that she was in a position to receive, and having received, to comply with these orders in connection with ropes or lines. At the material time I am satisfied that that period had not arrived ; but I think also that this phrase has to be read as if there were two parties involved in the matter, and that until the moment has come at which orders may reasonably be expected to be given from the ship the tug cannot be said to be in a position to receive orders from the ship. Whichever way it is looked at, even if looked at from the point of view of the tug alone, I am satisfied that on the facts of this case she was not in a position to receive orders and that the towing had not begun.

That being so, I dismiss the claim with costs. That leaves the original admission, having the effect of a judgment of the Court, where it is.

Solicitors for the plaintiffs : *Godfrey Warr & Co.*
Solicitors for the defendants : *Thomas Cooper & Co.*

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Shipping—Salvage—Vessel in ice-field—Answering S.O.S. messages—Damage while going to assistance—Service requested not rendered—Giving information as to course to clear ice-field—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 & 23 *Geo.* 5, *c.* 9), *s.* 26, *sub-ss.* 1, 7.

The defendants' steamship *T.B.*, while bound for St. John, New Brunswick, got into an extensive ice-field in which she sustained so much damage that she sent out an S.O.S. message, as it was thought that she was in danger of sinking. The S.O.S. message was heard and answered by the plaintiffs' steamship *N.*, which was some thirty miles away, and by other vessels, but none of these were within 200 miles of the *T.B.* The *N.* was also bound to St. John and had herself encountered the ice-field, but had got out of it and was in clear water. She at once turned back into the ice-field and pushed her way through the ice as fast as she could, doing damage to her hull and propeller to an amount which, with other expenses, was estimated at 4000*l.* While she was approaching the *T.B.* wireless messages were exchanged, and it was ascertained that the condition of the *T.B.* was not so serious as had been thought, and the only request made by her was that the *N.* should stand by and see her into St. John. The master of the *N.*, which was then about six or seven miles from the *T.B.*, did not think that the situation was such as to require him to stand by, and he sent the following message to the *T.B.*, which had been steering first S.W. and then more or less in a S.E. direction: "Recommend you steer due E. to clear water about twelve miles which I am doing." At that time the *T.B.* had been in the ice-field for some twenty-four hours, but on receipt of this information she altered course and followed the directions given to her by the *N.*, and so got clear of the ice. The plaintiffs claimed salvage.

By s. 26, sub-s. 1, of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932: "The master of a British ship . . . . on receiving on his ship a signal of distress by wireless telegraphy from any other ship, shall proceed with all speed to the assistance of the persons in distress, unless he is unable, or in the special circumstances of the case considers it unreasonable or unnecessary to do so"; and by sub-s. 7 it is provided that compliance with the provisions of the section shall not affect the right to salvage.

The defendants denied that any salvage services were rendered, as the *N.* was under a statutory duty to go to the assistance of the *T.B.*; they alleged that the damage sustained was while she was performing that duty; that the only assistance requested—namely, to stand by, was not rendered; and that they already knew the course to steer to get out of the ice-field, but this last point was found against them.

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The value of the *N.*, her cargo and freight, was alleged to be over 225,000*l.*; the value of the *T.B.* was agreed at 10,000*l.*:—

Held, that each separate item of the proceedings could not be isolated and regarded by itself and that the whole of the circumstances must be taken into account; that, without quantifying the moral support given to the defendants by the knowledge that the *N.* was coming to their assistance, the plaintiffs rendered a very definite salvage service, in the course of which the *N.* sustained considerable damage, in giving information that the *T.B.* would find clear water within twelve miles by steering E.; and that the proper award was the sum of 2000*l.*, of which, having regard to the damage, 1500*l.* would go to the owners of the *N.*, 200*l.* to the master and 300*l.* to the crew.

ACTION OF SALVAGE.

The plaintiffs were the owners, master and crew of the steamship *Newfoundland*; the defendants were the owners of the steamship *Tower Bridge*. The *Newfoundland*, a steel screw steamship of the port of Liverpool of 6791 tons gross, was bound from Liverpool to St. John, Boston and Halifax with general cargo and passengers, and was manned by a crew of 89 hands all told. Her value was stated to be 115,000*l.*, the value of her cargo 103,500*l.*, and freight and passage money 7066*l.*

The *Tower Bridge*, a steel screw steamship of 5161 tons gross, was in the course of a voyage from Blyth to St. John, N.B., in ballast, manned by a crew of 30 hands all told. For the purposes of the action her value was agreed at 10,000*l.*

The defendants denied that any salvage services were rendered by the plaintiffs.

The facts are summarized in the headnote and are fully set out in the judgment.

F. A. Sellers K.C. and *E. W. Brightman* for the plaintiffs. The salvage service started as soon as the *Newfoundland* received the S.O.S. message and, at great risk, altered her course and began to plough her way through the ice-field, in which she did herself a great deal of damage. The *Tower Bridge*, knowing that the *Newfoundland* was coming to her assistance, cancelled her S.O.S. message to other ships, and must be taken to have impliedly asked her to continue on.

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There is nothing in the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, to deprive a vessel answering an S.O.S. message of the right to claim salvage. On the contrary s. 26, sub-s. 7, expressly provides for it, and, quite apart from the statute, if an S.O.S. message is sent out and answered, and a vessel's services are accepted, that alone is sufficient to found a claim for salvage : see *The Stiklestad*. (1)

[THE PRESIDENT. There was a definite salvage bargain in that case.]

Quite apart from the moral support afforded to the *Tower Bridge* when those on board believed they were in great danger, the *Newfoundland* rendered a definite salvage service ; it is a much stronger case on the facts than *The Bengali* (2), where on a value of 2750*l*. Langton J. awarded 475*l*. to two trawlers for going to the assistance of a vessel which, before they arrived, took the assistance of another vessel nearer at hand. The *Newfoundland* gave the *Tower Bridge* the benefit of her knowledge as to the course which would take her out of the ice-field into clear water, and the *Tower Bridge*, which had been steering into the thickest part of the ice, at once acted upon that advice.

It was a very meritorious service, and the master took a grave responsibility in hazarding a very valuable ship under circumstances which might have justified him in not going to the vessel's assistance at all, and the award should cover the amount of the estimated loss and expenses with something in addition.

[Reference was also made to *The Undaunted*. (3)]

K. S. Carpmael K.C. and *H. G. Willmer* for the defendants. It was the duty of the master of the *Newfoundland* both as a seaman and under the Act of 1932 to go to the assistance of the *Tower Bridge* in response to her S.O.S. message, and it was solely in the performance of that duty that his vessel sustained damage ; he did not render the only service he was asked to do—namely, to stand by the vessel and see

(1) [1926] P. 205. (2) (1935) 52 Ll. L. R. 315.
(3) (1860) Lush. 90.

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her safely into St. John. His action, however meritorious, does not give rise to a claim for salvage, it was merely answering an S.O.S. : see *The Stiklestad*. (1) As regards giving advice—even if merely giving advice amounts to a salvage service, as to which see *The Little Joe* (2) and other cases referred to in Kennedy's Civil Salvage, 2nd ed., pp. 125–6 —the *Newfoundland* could have advised the *Tower Bridge* as to the course to be steered without turning back into the ice-field at all ; it is an everyday occurrence for vessels to give information to each other by wireless, and the *Newfoundland* had already got the damage before the advice was given.

[THE PRESIDENT. Coming to her assistance and giving advice is the service ; and if the *Newfoundland* came at risk and rendered a service, the fact that in coming through the ice she sustained damage should be taken into account.]

The advice, in the circumstances of this case, even if (contrary to the defendants' evidence) they did not know the nearest route to clear water, did not constitute a salvage service ; at the highest it was a service so trivial as to make it unjust to cast the burden of indemnifying the plaintiffs in respect of their damage and expenses, or indeed, to award anything like that sum.

THE PRESIDENT (SIR BOYD MERRIMAN). This is a salvage claim by the owners, master and crew of the steamship *Newfoundland* against the owners of the steamship *Tower Bridge*. The services which it is alleged were rendered were on April 9, 1935, while both vessels were westward bound in the North Atlantic making for St. John, New Brunswick.

There was a very extensive ice-field in the neighbourhood of the Labrador coast, and the *Tower Bridge* had got into this field while steering in a south-westerly direction on April 8. She got deeper and deeper into the field, with the result that by the morning of the 9th she was surrounded by heavy pack ice and was in a very dangerous condition. Her No. 1 hold was making water which could not be kept down ; she had a ten degree list to port, and generally speaking was in a

(1) [1926] P. 205. (2) (1860) Lush. 88.

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bad way. Her condition is set out in a protest by the chief officer, who was in charge owing to the illness of the master. He says that at 6.45 A.M. water was entering No. 1 hold rapidly through a hole in the starboard side. "Commenced pumping ballast out of the fore-peak and No. 1 tanks." "At 9.10 the ship listed 10 degrees to port, closely surrounded by pack ice and large growlers. Forehold rapidly filling. No. 2 bilges full. Sent S.O.S. message, as vessel appeared to be in danger of sinking."

As it happened, the only vessel at all near was the *Newfoundland*. No other vessel was within 200 miles or more, so that for all practical purposes she was the only vessel which could render assistance. The *Newfoundland*, also, had struck this ice-field, but her captain had contrived to get out of it, and was heading due south in clear water to the east of the field. He intended to continue on this course until he was satisfied that he had got round the south-east corner of this ice-field, when he would turn west again for St. John. In response to the S.O.S., and in acknowledgment of his duty as a seaman and as a citizen under the statute of 1932—which does not change the practice of seamen in answering calls of urgency—he at once turned back into the ice-field, and seeing that what he had received was an S.O.S. and not a less urgent signal of distress, he regarded it as his duty to go to the *Tower Bridge's* assistance as fast as he could drive his ship through the ice-field.

The *Newfoundland* was a valuable ship. It must not be taken that I accept the figures as absolutely correct, but it is pleaded that her value was 115,000*l.* odd, and, taken with her cargo, freight, passage money, etc., 225,000*l.* odd. It was therefore a heavy responsibility for her master to decide to drive her through this ice-field in the hope of being in time to save property certainly and, it might be, even life, for, to use his own phrase, he was not sure that the ship might not be down and the crew themselves on the ice.

Mr. Carpmael has argued that all that must be disregarded, because it was only the master's duty under the statute. If all that he does is to proceed in response to the statute

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and nothing results, he has never in fact rendered any salvage service, and I should agree with that argument; but I do not think that would be because he obeyed the statute but because there was no salvage service rendered. Sect. 26, sub-s. 7, of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provides that "Nothing in this section shall affect the provisions of section six of the Maritime Conventions Act, 1911 [which makes it obligatory on the master of a vessel "so far as he can do so without serious danger to his own vessel . . . . to render assistance to every person . . . . who is found at sea in danger of being lost"] and compliance by the master of a ship with the provisions of this section shall not affect his right, or the right of any other person, to salvage."

The *Tower Bridge*, however, was not quite in so desperate a situation as she had been, or as it was thought that she was, and she gradually began to get things under control; and when between 12 and 1 P.M. the *Newfoundland* came in sight, after working her way towards her on a series of zigzag courses, the *Tower Bridge* was found in comparatively clear water. At that time the request which was made to the *Newfoundland*, and the only request, was that she should stand by and see the *Tower Bridge* into St. John. It is not disputed that, if the *Newfoundland* had stood by, a definite salvage service would have been rendered. But the master of the *Newfoundland* took the view, after a discussion over the wireless with the *Tower Bridge*, that the situation was not such as to require him to stand by, and he made it plain that he was not prepared to stand by indefinitely. The element of standing by, therefore, for two or three days disappears from the case, and the defendants' contention is that that is the beginning and end of it; that the request to stand by not having been complied with (it was not insisted on) there cannot be any salvage service at all. I do not take that view.

I think that there was a perfectly definite service, and that, in considering whether there was or was not a service, the whole of the circumstances must be taken into

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consideration. I do not think that each separate stage can be isolated and regarded by itself, although of course one must be able to say that it was one particular thing, or that thing coupled with others, which constituted the service in question.

When these two ships were in contact—visible to each other—although in fact those on the *Tower Bridge* never saw the *Newfoundland* (a discrepancy which is simply explained by the fact that the *Newfoundland* had a much more exact direction-finding equipment and therefore knew exactly where to look for the *Tower Bridge*), and it was decided that the *Newfoundland* was not going to stand by to see the *Tower Bridge* into St. John, these messages were exchanged. From the *Newfoundland*: "As you have ship well under control I consider there is no necessity to stand by you. Suggest you ask patrol boat (1) to accompany you." Before the reply came, this message was sent: "Recommend you steer due east to clear water about twelve miles, which I am doing, and then south to about 46° N., 47° W.," to which the answer was: "Will carry out course you suggest." This gave perfectly definite information based on the experience of the *Newfoundland* herself. It gave the information that from the point where this ship was she could get into clear water in twelve miles by going in an easterly direction. That is what the *Newfoundland* was able to tell her precisely, because she had come through this twelve miles from the clear water to the assistance of the *Tower Bridge*, and had been heading south in the clear water at the time she received the S.O.S.

The chief officer of the *Tower Bridge*, in his evidence, said that he got this information and acknowledged it in those terms, but that was out of mere politeness; that it was what he was going to do in any case, and that he was merely thanking the *Newfoundland* for something that he knew already. I am quite satisfied that that is not the case. Of these two ships one had been in the clear water three or four hours before, and the other had been blundering about

(1) The ice patrol ship for the district which had answered the *Tower Bridge's* S.O.S.

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in the ice for some twenty-four hours, and I do not accept that the chief officer knew quite well which was the shortest way to the clear water. On the contrary his own log shows that he did not know. He admits that he was zigzagging here and there, and it is indisputable that having gone into the ice on a south-west course, speaking generally, he had tried to work his way out on a south-east course, more or less, and had proceeded in that sort of direction for fifty or sixty miles at the time when he sent the S.O.S., but did not get out of the ice.

I come to the conclusion that so far from knowing that he could get out of the ice to the eastward, he thought that having been going southerly and easterly for some time he would be more likely to strike the southern edge of the ice than the eastern. He therefore tried to get out that way, and speaking generally that was the way he had been working until the *Newfoundland* came up to him ; and, after receiving the *Newfoundland's* information, it is recorded in his log that he turned through 60 degrees and in fact, though not visually, followed the *Newfoundland* out of the ice-field.

I will now read the last four messages which passed between these two ships. At 8.2 P.M. from the *Newfoundland* : " We are now clear of the ice-field and steering south, true, 47° 08′ N., 46° 30′ W." Reply from the *Tower Bridge* : " Heading towards your position, making slow progress. Propeller damaged ; vessel down by head ; bulkhead between forward holds bulging ; pumps keeping down water in hold. Hope to keep going." At 10.5 there was a further message from the *Newfoundland* : " Suggest you keep in constant touch with ice patrol, giving your movements. Apart from three icebergs well out of our track we have had clear water since our last message." At 10.44 the last reply of the *Tower Bridge* was sent : " Now clearing ice. Thanks for messages. Will inform patrol."

I think that these messages compel me to find that so far from being a polite exchange of compliments what was actually happening was that the *Tower Bridge* was following the *Newfoundland* out into clear water and did by these means reach it.

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I am advised by the Elder Brethren that without doubt, from the seaman's point of view, a very material service was rendered by the *Newfoundland*. It is not necessary to define the precise moment at which the service began or to quantify the moral support afforded to the *Tower Bridge* when the only available ship in the North Atlantic came ploughing her way through the ice and the *Tower Bridge* was in the greatest possible danger and believed to be sinking. The substance of the matter is that having been asked to go and having got there the *Newfoundland* rendered most valuable assistance in showing the *Tower Bridge* how to get out of the ice-field. If that vessel had been left to herself and had gone on to the southward, as she was doing when she sent the S.O.S., she had 50 or 60 miles of ice-field ahead of her instead of the twelve miles to the eastward, and no one can tell what might have been the result of her trying to blunder through that unaided.

Under these circumstances I have to make up my mind what is the proper award to make. I have looked at the passage in Kennedy's Civil Salvage, 2nd ed., p. 133, where the various heads of matters to be taken into account are set out. As regards the ship salved there is no doubt that there was considerable danger both to life and property. As regards the salvors, there was danger to these also. I think that the captain was asked to take, and did take, a very great responsibility in going back into that ice-field in the way he did. In fact the *Newfoundland* damaged her propeller very considerably, and if she had become disabled her situation would have been very awkward. She might have been holed just as the *Tower Bridge* was, and she undoubtedly took some risk.

I think that the conduct and skill of the master of the *Newfoundland* were most praiseworthy. I am not going to say whether he could have exonerated himself from obeying the S.O.S. signal, but he never hesitated for a moment. He was exposing a valuable ship to danger, a danger which has resulted in damage which may or may not amount to the 4000*l.* which is claimed. Obviously the award would have

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The President.

had to be much greater if the salvors had spent the time and labour which would have been involved in standing by until the *Tower Bridge* actually reached St. John; but that they did not do. In all the circumstances I think that the proper award to make is 2000*l.*, of which 1500*l.* will go to the owners; 200*l.* to the master, who incurred considerable responsibility; and 300*l.* to the officers and crew, according to their ratings.

Sellers K.C. Would your Lordship apportion the award to the owners in respect of the cost of repairs? I apprehend that the underwriters would not be entitled to any part of this award unless it is appropriated.

THE PRESIDENT. In awarding three-fourths of the total sum to the owners, I was influenced by the fact that these expenses have been incurred—expenses to a larger amount than any sum which it would be possible to award for salvage—but I cannot say more than that.

Solicitors for the plaintiffs: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitors for the defendants: *Constant & Constant.*

E. C. M. T.

1935
July 30;
Nov. 11.

In the Estate of A. B. SIMPSON (DECEASED).

In the Estate of J. G. GUNNING (DECEASED).

Probate — Practice — Intestacy — No personal representative — Actio personalis—Appointment of Administrator of deceased Intestate to constitute defendant in an Action the cause of which subsists against the estate of the Intestate—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 162, *as amended by the Administration of Justice Act*, 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 9—*Law Reform* (*Miscellaneous Provisions*) *Act*, 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-s.* 1.

In the absence of a personal representative of a deceased intestate, against whose estate a cause of action survived by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, the Court appointed as administrator of the deceased the nominee of a party intending to prosecute the cause of action in order that proper parties to the action should be constituted.

The machinery of the Administration of Justice Act, 1928, s. 9, proviso (*b*), applied.

MOTIONS for the appointment of administrators.

Each of the persons indicated in the respective titles of these motions died intestate, and in circumstances which gave rise to a cause of action subsisting against him on his death and surviving against his estate pursuant to the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1. In neither case was there an existing personal representative of the deceased available to constitute the proper defendant party to the action. The Court was moved in both cases on behalf of the intending plaintiff in the exercise of its discretion under the power conferred upon it by the Administration of Justice Act, 1928, s. 9, to appoint as administrator such person as it should think expedient; the person suggested in both cases being in fact the nominee of the applicant who was proposing to bring an action and hindered in doing so by reason of the absence of a personal representative of the deceased against whose estate the cause of action survived.

ALISTAIR BEGG SIMPSON (DECEASED).

The deceased, Alistair Begg Simpson, died on October 8, 1934, as the result of a collision between a motor-cycle ridden by him and a motor-car driven by G. W. Miskin, the applicant. The deceased died a minor intestate, leaving his parents the only persons entitled to his estate, which consisted solely of an insurance policy under which a claim against the insurance company might arise in connection with the events which had happened.

The insurance company with whom the policy had been effected had repudiated liability. The parents of the deceased had refused to take out administration to his estate. The applicant and M. R. Miskin, a passenger in the motor-car at the time of the collision, both of whom were injured, and E. Miskin, the owner of the car, who had incurred expenses in connection with what had happened, desired to bring an action for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, amending the law as to the effect of death in relation to causes of action, against the estate of the said deceased, and for the purpose of constituting proper and necessary parties to such action to have an administrator appointed to the estate of the said deceased against whom an action could be brought. It was proposed to appoint as administrator one L. V. Slater, a chartered accountant, whose consent to act was filed.

H. B. Durley Grazebrook in support of the motion. An administrator to the estate of the deceased is a necessary party to enable the claimants under the policy to pursue their claim. An instance of the practice under the former appropriate statute, The Court of Probate Act, 1857, s. 73, as to appointing an administrator for the purpose of enforcing a claim against a deceased intestate is to be found in *In the goods of Wensley*. (1) The wording of the former statute and that of the Administration of Justice Act, 1928, s. 9, proviso (*b*), are very similar. I submit that the latter statute replacing the former covers this case.

(1) (1882) 7 P. D. 13.

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A. B. SIMPSON, *In the Estate of.*
J. G. GUNNING, *In the Estate of.*

JOHN GILLESPIE GUNNING (DECEASED).

John Gillespie Gunning died as the result of a collision of two motor-cycles, one of which he was riding, on November 7, 1934. He died intestate and without issue, leaving a widow, P. Gunning, and a father, E. Gunning. His only estate was the benefit of a third-party indemnity policy effected with a Motor Insurance Company, and wearing apparel. His widow and father both refused to take administration to his estate.

F. A. Pidwell, a person injured in the collision, desired to claim damages as against the estate of the deceased, and was hindered in the prosecution of his claim owing to the absence of a legal personal representative of the deceased, and moved under the Administration of Justice Act, 1928, s. 9, for a grant of letters of administration of the estate of the deceased to his (the applicant's) nominee, and that the citation of the widow and father of the deceased should be dispensed with.

1935. July 30. On motion made to the Court for a grant of administration to the nominee accordingly a grant was ordered as prayed under the Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, subject to a letter being obtained from the widow consenting not to apply for a grant. The widow had refused to take any part in the proceedings and ignored them.

The motion was now restored for the direction of the Court. Notice had been given to the widow.

1935. Nov. 11. The restored motion now came on for hearing, and by it the consent of the widow was sought to be dispensed with.

Talbot-Ponsonby in support of the motion.

The Court (LANGTON J.) made a grant as prayed in both cases.

Solicitors, in the case of Simpson: *Waterhouse & Co., for Few & Co., Cambridge.*

Solicitors, in the case of Gunning: *Savage Cooper & Wright, for Wilson A. L. Houlder & Co., Southall.*

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A. B. SIMPSON, *In the Estate of.*

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NOTE.

Administration of Justice Act, 1928, s. 9. 'In section one hundred and sixty two of the principal Act (which makes provision with respect to the exercise of the discretion of the Court in granting administration), the following proviso shall be substituted, for the proviso to sub-s. (1) thereof:—

"Provided that . . . .

(*b*) if, by reason of the insolvency of the estate of the deceased or any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under the provision may be limited in any way the Court thinks fit;" and the principal Act shall be deemed always to have had effect as if the proviso hereby directed to be inserted had been contained in the said sub-s. (1) as originally enacted.'

R. M. M.

SALLIS AND ANOTHER *v.* JONES.

1935
Nov. 12.

Probate—Will—Revocation—Marriage—Contemplation of a marriage—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 177.

Sect. 177 of the Law of Property Act, 1925, does not prevent s. 18 of the Wills Act, 1837, from operating to revoke a will made before marriage, unless there is found in the will something more than a declaration relating to or a reference to marriage generally.

ACTION to establish will.

The testator, Evan Jones, by his will dated June 27, 1927, appointed his two daughters, Mrs. Muriel Ceinwen Sallis and Mrs. Irene Sylvania Evans, his executrices and residuary legatees. He also, in the final sentence of the will, declared "that this will is made in contemplation of marriage." On November 27, 1927, the testator married his second wife. He died on November 17, 1934, and his second wife survived him.

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SALLIS v. JONES.

A probate action was begun by the executrices in which they claimed to have the above mentioned will established. The defendant (the testator's widow) alleged that the will was invalid, on the ground that it did not come within the exception to s. 18 of the Wills Act, 1837 (1), set out in s. 177 of the Law of Property Act, 1925. (2)

F. S. H. Bryant (*Clifford Mortimer* with him) for the plaintiffs. The will comes within the exception to s. 18 of the Wills Act, 1837, provided by s. 177 of the Law of Property Act, 1925, and is not revoked by the testator's subsequent marriage. The last words of the will must be interpreted as referring to the particular marriage of the testator with the defendant.

P. B. Morle for the defendant. The will is invalid. In order that the requirements of s. 177 may be complied with the name of the intended spouse should be inserted in the will itself, which is made in contemplation of a particular marriage.

[He referred to *Pilot* v. *Gainfort*. (3)]

BENNETT J. This is an action in which the plaintiffs are the two daughters of the late Mr. Evan Jones, the testator, who died on November 17, 1934. The plaintiffs propound a will made by the deceased on June 27, 1927.

At the time when the will was made the deceased was a

(1) Sect. 18 of the Wills Act, 1837, provides as follows:— "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the statute of distributions)."

(2) Sect. 177 of the Law of Property Act, 1925, provides as follows: "(1.) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in s. 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated. (2.) This section only applies to wills made after the commencement of this Act."

(3) [1931] P. 103.

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widower, his first wife having died on February 28, 1927. Evidence has been adduced on behalf of the plaintiffs which establishes that the will which they propound was executed by the testator in accordance with the requirements of the Wills Act, 1837. But the defendant, who is the widow of the deceased, defends the action and resists the claim to have the will admitted to probate on the ground that the will was revoked by the marriage of the testator to her on November 7, 1927. The only question which I have to decide is whether the defendant's marriage with the deceased revoked the will of June 27, 1927.

Before the year 1926, when the Law of Property Act, 1925, came into operation, the case would have been clear. Sect. 18 of the Wills Act provided as follows: [His Lordship read the section and continued:] The will in this case is within the section; and before the Act of 1925 came into operation it is clear that it would have been revoked by the marriage of the deceased. But s. 177 of the Law of Property Act, 1925, restricts in certain circumstances the operation of s. 18 of the Wills Act. Sect. 177 is expressed in these terms: [His Lordship read the section and continued:] Now the will which the plaintiffs propound ends with this sentence: "And I hereby declare that this will is made in contemplation of marriage."

There has been evidence in this case which I admitted de bene esse, and there has been some conflict as to what was the position of the deceased on June 27, 1927, when he made his will, with regard to the lady who became his wife on November 7, 1927.

Evidence has been called by the plaintiffs for the purpose of proving that at that date the deceased had in mind marriage with the defendant. The evidence consisted of statements said to have been made by the deceased to his brother-in-law, his sisters and his daughter before June 27, 1927—statements in which, according to the evidence, the testator had in mind marriage with the defendant. On behalf of the defendant evidence has been called which quite plainly establishes that whatever the deceased may have had in

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his mind he had not proposed to the defendant or been accepted by her until some date in August, 1927, after the will was made.

I accept the evidence of the defendant that she never promised to marry him until some date in August, and then only upon the terms that the marriage was not to take place until twelve months after the death of his first wife.

The terms which were arranged between the testator and his wife were modified, because the plaintiff Mrs. Evans, who had lived with the deceased, herself got married, and when she married she left her father's house.

I do not think it is necessary for me to decide, having regard to the view which I take of the section, whether or not the evidence is admissible.

In my judgment s. 177 of the Law of Property Act, 1925, upon its true construction excludes the operation of s. 18 of the Wills Act if the will made before a marriage is expressed to be made in contemplation of a particular marriage and is followed by the solemnization of that marriage. It is plain, in my judgment, upon the strict construction of s. 177 of the Act of 1925, that it has no operation unless there is found in the will something more than a declaration containing a reference to marriage generally. All that is to be found in the present will is a declaration that the will was made " in contemplation of marriage " and nothing more.

In my view the will propounded by the plaintiffs was revoked by the subsequent marriage of the deceased, and I pronounce against that will.

Solicitors: *John T. Lewis & Woods, for William Herbert Lewis, Aberayron; Horace W. Davies, for D. Emrys Williams & Co., Aberystwyth.*

J. L. D.

In the Estate of HENRY THOMAS PARNALL (DECEASED).

1935
Dec. 5.

Administration — Intestacy — Presumption of death — Date of death unknown—Right to grant—Special Administrator—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 162, *sub-s.* 1—*Administration of Justice Act*, 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 9.

An intestate was presumed to have died in or since 1905. Owing to the uncertainty of the date of his death it was not known whether he was survived by his father, who in that event would have been entitled to a grant of administration. The father died in 1909 leaving a will, and a brother of the presumed deceased was now entitled to a grant of administration of his estate whether as his next of kin or as the executor of his father. The brother of the presumed deceased refused either to renounce his derivative right as executor of his father or to take the grant in his original right as next of kin of his brother, and he had become bankrupt.

The Court granted administration under the Court of Probate Act, 1857, s. 73, to the Public Trustee.

MOTION for a grant of administration to the estate of Henry Thomas Parnall, deceased.

On February 11, 1935, leave was given by the Court to swear that the deceased died intestate and a bachelor on or since May 4, 1905, the date when he was last heard of. His estate amounted to about 546*l.* Owing to uncertainty as to the date of his death doubt arose who was entitled to the grant. His father, Thomas Luxon Parnall, died on or about July 20, 1909. The surviving executor of T. L. Parnall was his son, William Seldon Parnall, a brother of the deceased, who was entitled to the grant to the deceased now asked for, whether as surviving executor of Thomas Luxon Parnall should the latter have survived Henry Thomas Parnall, or as next of kin of Henry Thomas Parnall in the event of the latter having survived Thomas Luxon Parnall. Other next of kin of Henry Thomas Parnall were two sisters—namely, the applicant, Rosina Margaret Luxon. Yates, a married woman, at whose instance the order of February 11, 1935, had been obtained, and Gertrude Mary Teagle, a married

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woman of unsound mind. William Seldon Parnall refused either to renounce the derivative right he might have to the grant as the surviving executor of his father or to take the grant in his original right as next of kin of his brother. On June 15, 1932, he had been made bankrupt, and his estate was being administered by the Official Receiver in Bankruptcy. The Public Trustee had signified his consent to act as administrator of Henry Thomas Parnall in the event of an order being made.

The present application was by Rosina Margaret Luxon Yates for a grant to the Public Trustee under the Court of Probate Act, 1857, s. 73, or alternatively under the Administration of Justice Act, 1928, s. 9, replacing the proviso to the Judicature (Consolidation) Act, 1925, s. 162, according to the appropriate legislation in force at the date of the death of the deceased whenever it actually occurred.

The application was made on notice to William Seldon Parnall.

N. H. Moller for the motion. The refusal of William Seldon Parnall to take the grant in either of the capacities under which he may be entitled is such a special circumstance as would justify the Court in appointing some person not by law entitled. The material statutes contemplate the appointment of a special administrator in a like case. The uncertainty of the date of death and consequently as to the right to the grant has been regarded as a special circumstance per se in selecting an administrator: *In the Goods of Peck* (1); *In the Goods of Harling* (2), in which *In the Goods of Peck* (1) was followed.

W. Hanbury Aggs for the Public Trustee.

William Seldon Parnall did not appear.

The Court (LANGTON J.) made the grant as prayed.

Solicitors: *Braikenridge & Edwards, for Veale & Co., Bristol.*

(1) (1860) 2 Sw. & Tr. 506. (2) [1900] P. 59.

R. M. M.

Distinguished. JEFFREY v. JEFFREY [1951] P. 32

DAGLISH *v.* DAGLISH.

1935
Dec. 16.

Divorce—Adultery of husband—Alternative remedies of wife—Dissolution of marriage—Judicial separation—Discretion of the Court—Remedy varied by substitution of decree of Judicial separation for decree nisi for dissolution—Matrimonial Causes Act, 1923 (13 & 14 *Geo.* 5, *c.* 19); *Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 176 (*b*), 226; *Sch.* 6.

MOTION to rescind decree nisi and to substitute decree for judicial separation.

The wife, Mary Helen Daglish, filed a petition for judicial separation on the ground of desertion on May 24, 1933. On November 29, 1934, a charge of the adultery of the husband, W. Arnold Daglish, was added to the petition by amendment and the prayer of the petition was amended by claiming dissolution of marriage. The husband did not defend the amended petition, and on the petition as amended a decree nisi dissolving the marriage was pronounced on July 17, 1935. As part of the terms of a compromise dated October 12, 1931, of proceedings in the Chancery Division certain property had been settled upon trusts for the respondent husband for life and after his death for all his children by his present or any future wife. There were two children of the existing marriage. In order to prevent as far as possible any children that the respondent, if divorced, might have by a second marriage from sharing in the settled property to the prejudice of the children of the existing marriage, the petitioner desired to vary the decree pronounced for the dissolution of the marriage by substituting a decree of judicial separation.

The petitioner now moved accordingly to rescind the decree nisi for the dissolution of the marriage and to substitute a decree of judicial separation.

F.L.C. Hodson for the motion. The petitioner having obtained a decree nisi for the dissolution of her marriage is entitled to a decree of judicial separation: *Parsons* v. *Parsons*. (1) The

(1) [1907] P. 331.

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greater remedy includes the less. In *Rutter* v. *Rutter* (*No.* 2) (1) Sir Henry Duke P. incidentally decided that he had power to rescind a decree nisi on the application of the party who had obtained it. In *Rutherford* v. *Richardson* (2) the House of Lords affirmed a decision of the Court of Appeal (3) dismissing a petition for dissolution of marriage on charges of adultery and cruelty on which a decree nisi had been pronounced and granting a decree of judicial separation on the ground of cruelty only. In *Blanchard* v. *Blanchard* (4) Hill J. said: "Before the Act of 1923 when the only marital offence of the husband was adultery, the wife could obtain no relief other than a decree of judicial separation. But if there were no legal ground against it she had a right to that decree. That right has not been taken from her because an alternative remedy was given to her by the Act of 1923."

The husband did not appear.

Notice had been given to the King's Proctor, who did not oppose.

LANGTON J. made an order in the terms of the motion.

Solicitors: *Wrentmore & Son.*

(1) [1921] P. 421, 424.
(2) [1923] A. C. 1.
(3) *Rutherford* v. *Rutherford* (*Richardson* intervener) [1922] P. 144, 161.
(4) (1928) 44 Times L. R. 313, 315.

R. M. M.

THE BELDIS.

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1935

Oct. 17, 18; Nov. 4; Dec. 19.

Shipping—Jurisdiction in rem—Action on an award under an arbitration—County Court Admiralty Jurisdiction—Arrest of ship belonging to defendants other than ship in respect of which cause of action arose—"Claim arising out of any agreement made in relation to the use or hire of any ship"—County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2, *sub-s.* 1.

An action in rem was brought in a county court having Admiralty jurisdiction by the plaintiffs against the defendants, the owners of the Norwegian s.s. *Beldis*, for 27*l.* 4*s.* 6*d.* payable by the defendants to the plaintiffs under an arbitrator's award in respect of overpayment of chartered freight. The arbitration was held by virtue of a clause in a charterparty relating, not to the *Beldis*, but to the s.s. *Belfri*, another ship belonging to the defendants. The defendants failed to appear and judgment was entered against them by default. Thereupon the present appellants, who held a mortgage on the *Beldis*, intervened, and by agreement an issue was submitted to the county court judge as to "whether the plaintiffs' action in rem against the s.s. *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the s.s. *Belfri* belonging to the same owners."

The county court judge decided in favour of the plaintiffs upon a dictum of the Court of Appeal in regard to procedure in rem in *The Henrich Björn* (1885) 10 P. D. 44, 54 (1), that "the arrest need not be of the ship in question, but may be of any property of the defendant within the realm." The interveners appealed.

On appeal, the Court raised the question whether, apart from the point for decision in the agreed issue, the issue itself was not based on a misconception, as it asserted that the plaintiffs' action arose out of a charterparty, whereas it appeared to be based upon an award.

By s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869, any county court appointed to have Admiralty jurisdiction "shall have jurisdiction . . . . to try . . . . any claim arising out of any agreement made in relation to the use or hire of any ship . . . .":—

Held, (*a*) that the cause of action alleged was an ordinary common law claim for payment of money under an award and was not within the jurisdiction conferred by the Act of 1869; but (in case the court's interpretation of the words "arising out of any agreement," etc., should be held by the House of Lords to be wrong).

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(1) In the Court of Appeal the case is reported as *The Heinrich Bjorn*, and in the House of Lords (11 App. Cas. 270) as *The Henrich Björn*. The latter form has been adopted throughout the present report.

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Held further, after a full review of the authorities,

(*b*) that the dictum in *The Henrich Björn* was obiter, was not therefore binding, and was erroneous; that the procedure in rem either in the Admiralty Court or in the county court does not permit the arrest of a ship or other property of a defendant unconnected with the cause of action; and that on both grounds the appeal must be allowed.

Dictum of the Court of Appeal delivered by Fry L.J. in *The Henrich Björn* (10 P. D. 44, 54) disapproved.

APPEAL from a decision of the county court judge sitting at Newport, Mon.

The facts, which are fully set out in the judgments, very shortly stated, were as follows: The plaintiffs, the Anglo-Soviet Shipping Co., brought an Admiralty action in rem against the owners of the s.s. *Beldis* to recover moneys due under an award in an arbitration held by virtue of a clause in a charterparty relating to another steamship belonging to the defendants, the s.s. *Belfri*. The claim was in respect of the overpayment of chartered hire. The defendants did not appear and accordingly judgment was entered against them in default. Thereupon Lambert Bros., Ld., who had a mortgage on the *Beldis*, obtained leave to intervene, and the case came before the Court on the sole issue whether the action in rem against the *Beldis* was maintainable. On the authority of a dictum in *The Henrich Björn* (1), the county court judge found in favour of the plaintiffs. The interveners appealed.

Owen Bateson for the appellants. The plaintiffs' action in rem against the defendants, "the owners of the s.s. *Beldis*," to enforce an award made in respect of the defendants' s.s. *Belfri* is not maintainable. There is no distinction between High Court and county court jurisdiction on this question, except that the county court's jurisdiction is limited as to amount. The material section, s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869, provides that a county court appointed to have Admiralty jurisdiction shall have jurisdiction to determine "any claim arising out

(1) 10 P. D. 44, 54.

of any agreement made in relation to the use or hire of any ship . . . .", and, by s. 3, the jurisdiction may be exercised either by proceedings in rem or by proceedings in personam. The Act was in fact repealed by the County Courts Act, 1934, but the provisions of the Act were re-enacted in s. 56 of the latter Act, and for the purposes of the present case the 1869 Act is in point.

The dictum of the Court of Appeal in *The Henrich Björn* (1), on which the county court judge based his decision, is a mere expression of opinion and is wrong ; and when the case went to the House of Lords the statement was not referred to. There is no instance to be found in any reported case, either in the High Court or in the county court, since those courts were given Admiralty jurisdiction, of the arrest in an action in rem of any property of a defendant other than the res in respect of which the cause of action arose. The sole question in *The Henrich Björn* (1) was whether there was a maritime lien for necessaries ; if there was not the action failed, as the ship had been sold and was in the hands of other owners ; and it was unnecessary to discuss the nature of an action in rem ; the dictum, therefore, is obiter. Arrest of the person had been obsolete for many years. The last recorded case was in 1780 : see per Dr. Lushington in *The Clara* (2), a statement quoted with approval in *The Dictator* (3) by Jeune P., and by Gorell Barnes J. in *The Ripon City*. (4) Jeune P. also said that arrest of other property of the defendant had fallen into desuetude, and, although he adds that "in theory" arrest of property merely to enforce appearance "would still seem to be permissible," he is merely quoting the dictum of Fry L.J. in *The Henrich Björn* (5) and gives no other authority for the proposition. Before the Admiralty Court Acts of 1840, the jurisdiction of the High Court of Admiralty was exercised in rem in such matters as from their very nature would give rise to a maritime lien—e.g., collision, salvage, bottomry—and arrest of property other than the ship concerned did not enter

(1) 10 P. D. 44, 54 ; 11 App. Cas. 270.
(2) (1855) Swa. 1, 3.
(3) [1892] P. 304.
(4) [1897] P. 226, 240.
(5) 10 P. D. 44, 54.

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into the question. After 1840 the jurisdiction was extended to cover certain matters in respect of which there was no maritime lien—e.g., necessaries supplied to a foreign ship.

[SCOTT L.J. referred to *The Bold Buccleugh.* (1)]

At the time that case was decided it was thought, erroneously, that where there was an action in rem there must be a maritime lien, and it is obvious, therefore, that it could not have been thought that other property of a defendant could be arrested in an action in rem; *The Bold Buccleugh* (1), therefore, is strongly in favour of the appellant's contention. The Acts of 1840 do not mention proceedings in personam at all, and theoretically, even before 1840, a plaintiff could have sued in the High Court of Admiralty in respect of the supply of necessaries, subject no doubt to the risk of prohibition by the Courts of King's Bench.

[SWIFT J. Can you proceed concurrently in rem and in personam ?]

After appearance the personal liability of the owner is substituted for the res, but that liability would only arise if the res was insufficient and it was a case of enforcing the judgment: see *The Dictator* (2), which was followed in *The Gemma* (3) and *The Joannis Vatis* (*No.* 2) (4): but see also Williams and Bruce's Admiralty Practice, 3rd ed., p. 19.

In *The Henrich Björn* (5) Fry L.J. was assuming that the procedure of the civil law and Admiralty procedure were similar; they were not. Admiralty procedure is derived only in part from the civil law; it is largely derived from the ancient customs of the seas. Further, he referred to the "new jurisdiction" given to the Court of Admiralty by the Acts of 1840. If new, it would not carry by implication any of the old rights, and certainly not rights which even then had long fallen into disuse.

[Reference was also made to *The Alexander Larsen* (6), *The Charkieh* (7), *Sheaf Steamship Co.* v. *Compania*

(1) (1851) 7 Moo. P. C. 267.
(2) [1892] P. 204.
(3) [1899] P. 285.
(4) [1922] P. 213.
(5) 10 P. D. 44, 54.
(6) (1841) 1 W. Rob. 288, 293.
(7) (1873) L. R. 4 A. & E. 59, 91.

Trasmediterranea (1), and, by the learned President, to *The Gas Float Whitton* (*No.* 2). (2)]

A. T. Miller K.C. and *Norman Richards* for the respondents. The finding of the county court judge, based on the dictum in *The Henrich Björn* (3) is entirely reasonable and there is nothing novel in it. It is simply a question of the construction of ss. 2 and 3 of the County Courts Admiralty Jurisdiction Amendment Act, 1869. Even if (contrary to the respondents' contention) the right of arrest in an action in rem is limited in the High Court to the actual res it does not follow that it is so limited in the county court.

[THE PRESIDENT. Are you contending that the county court has wider jurisdiction than the High Court ?]

It may be that in this case it has ; it undoubtedly has in charterparty cases : see *The Alina* (4), following *Cargo Ex Argos.* (5) There is, therefore, no reason for the ancient rights to be limited to the delinquent property, or for the " proceedings in rem " (s. 3 of the Act of 1869) to be restricted to the process in rem of the High Court : see *The Alexander Larsen.* (6) Actions in rem are available to cover two classes of cases, the property subject to the lien in actions in which there is a maritime lien, and where there is no maritime lien, the property of the defendant within the jurisdiction for the enforcement of rights against the person, as, e.g., in necessaries cases. In the present case it is a debt of the defendant shipowner which is in question and it does not matter what property of the debtor is proceeded against. The dictum in *The Henrich Björn* (3) is not obiter. It was a link in the chain of reasoning ; the Court had to consider and review the whole position in order to reach the ultimate conclusion : cf. the observations of Kay J. in *Westrup* v. *Great Yarmouth Steam Carrying Co.* (7) The House of Lords expressed not a word of dissent from the Court of Appeal's judgment.

[THE PRESIDENT. Is not the passage in Lord Watson's speech (8) only consistent with the opposite view?]

(1) (1930) 36 Ll. L. R. 197.
(2) [1896] P. 42 ; [1897] A. C. 337.
(3) 10 P. D. 44, 54.
(4) (1880) 5 Ex. D. 227.
(5) (1872) L. R. 5 P. C. 134.
(6) 1 W. Rob. 288, 293.
(7) (1889) 43 Ch. D. 241, 245.
(8) 11 App. Cas. 270, 276.

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Lord Watson only mentions "the" ship in enumerating the maritime debts in respect of which actions in rem can be brought, but his statement is not necessarily so limited, for he says that the attachment "has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor," and he may not have had the present point in mind.

The late Mr. Carver quoted the dictum of Fry L.J. with approval in *The Zeta* (1): see also Carver's Carriage of Goods by Sea, 7th ed., s. 694, p. 963.

[SCOTT L.J. The Committee on Arrestment in 1928, presided over by Hill J. (2) did not suggest that there was any such right in English law as the respondents are claiming and the Committee advised against it.]

[THE PRESIDENT. The further question emerges whether there is any jurisdiction to deal with this matter at all. The issue arises under an arbitration. How can that be within the jurisdiction of the county court judge sitting in Admiralty? You can only enforce an award at common law.]

The parties agreed to ask the judge to decide a "sole issue"; they waived any question of jurisdiction; and the plaintiffs are entitled to hold the judgment in their favour. In law, however, the county court judge had jurisdiction. The action between the plaintiffs and the defendants was for money due under an arbitrator's award in respect of a charterparty relating to the s.s. *Belfri*. It is therefore a claim "arising out of an agreement for the use or hire of a ship" within the meaning of s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869. The words "arising out of" give a very wide scope to the section. The judge had jurisdiction to entertain the action in which judgment was entered in default of appearance, and it does not matter that the proceedings only came before him for argument on the issue submitted by the plaintiffs and the interveners. The statute enlarged the jurisdiction of county courts and ought, according to the general rule of such statutes, "to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow" (per Sir Montague Smith, referring

(1) [1893] A. C. 468, 475. (2) (1928) Cmd. 3108.

to the Admiralty Court Act, 1861, in *The Pieve Superiore* (1)) : see also O. xxxix., r. 11, of the County Court Rules, 1903–34.

[THE PRESIDENT referred to r. 9 and to *R.* v. *Judge of City of London Court.* (2)]

[The Court intimated that at this stage they did not want to hear the appellants on this point, and the argument on the question of the validity of the proceedings against the *Beldis* continued.]

The old High Court of Admiralty asserted the right to arrest any property of the defendant within the jurisdiction of the Admiral in order to obtain security that judgment should be satisfied : see " Select Pleas in the Court of Admiralty," published by the Selden Society, vol. i., p. lxxi., and *Warner* v. *Wheler*, ibid. 220.

The ordinary method of commencing the suit was by arrest either of the person of the defendant or his property. No doubt the Admiralty Court has relinquished the right as regards arrest of the person ; there is, however, not only a vast difference between the two methods of procedure but also authority for saying that while the one has gone the other still remains. If it has become obsolete it has not been shown when and how.

If a defendant appears, and the res is insufficient, he can be made to satisfy the balance of the judgment debt by seizing any of his property within the jurisdiction : *The Dictator.* (3) In *Currie* v. *M'Knight* (4) Lord Halsbury said that " Scottish Admiralty Courts and English Admiralty Courts administer the same law . . . . The Admiralty laws were derived . . . from the same source ; . . . . and . . . it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island " ; and in Scotland other property of a defendant can be arrested to found jurisdiction : *Sheaf Steamship Co.* v. *Compania Trasmediterranea.* (5)

[THE PRESIDENT. As appears from the judgments, the law

(1) (1874) L. R. 5 P. C. 482, 492.
(2) [1892] 1 Q. B. 273.
(3) [1892] P. 304.
(4) [1897] A. C. 97, 101, 102.
(5) 36 Ll. L. R. 197, 198, 202.

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of Scotland provides for the foundation of jurisdiction, in cases wholly unconnected with Admiralty, by arrestment of any property of the defender. The point of the decision is that this also applies to the Admiralty jurisdiction of the Sheriff Court, notwithstanding, as is expressly assumed, "that under English Admiralty law, arrestment, in order to be good, must be arrestment of the wrongdoing vessel": see The Lord Justice-Clerk, and Lord Hunter.]

[Reference was also made to *The Volant* (1), and *The Minerva.* (2)]

Owen Bateson, who was not called on to reply on the question of the validity of the arrest, said that he did not want to put forward a contrary view to that advanced by the respondents on the question of jurisdiction, and would merely refer to three further cases bearing on the words "arising out of any agreement made in relation to the use or hire of any ship"—namely, *The Nuova Raffaelina* (3), *The Isca* (4) and *The Zeus.* (5)

Cur. adv. vult.

1935. Dec. 19. The following judgments were read:—

THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from the judgment of His Honour Judge Thomas sitting in Admiralty in the Newport County Court. On April 5, 1935, proceedings in rem were taken in that court by the Anglo-Soviet Shipping Co., Ld., against the owners of the s.s. *Beldis*, then lying in Newport Docks, for the sum of 27*l.* 4*s.* 6*d.*, payable by the defendants to the plaintiffs under an award dated January 24, 1935, made in a certain arbitration held by virtue of a clause in that behalf in a charterparty, dated July 13, 1933, between the defendants of the one part and the agents of the plaintiffs for and on behalf of the plaintiffs, of the other part. The owners of the *Beldis* failed to appear within the four clear days specified in the summons, and accordingly on April 10, 1935, judgment was entered against

(1) (1842) 1 W. Rob. 383, 388, 389.
(2) [1933] P. 224.
(3) (1871) L. R. 3 A. & E. 483.
(4) (1886) 6 Asp. M. L. C. 63.
(5) (1888) 13 P. D. 188.

them by default. On April 24, 1935, Messrs. Lambert Brothers, Ld., the appellants in this appeal, filed an affidavit showing that by virtue of a mortgage bond dated April 23, 1929, they were mortgagees of the s.s. *Beldis*, and that the award upon which the plaintiffs were suing related to a claim arising under a charterparty which did not relate to the s.s. *Beldis* at all, but to another ship of the same owners named the *Belfri*. It will be observed that the particulars of the plaintiffs' claim to which I have already referred, did not specify the ship in respect of which the charterparty of July 13, 1933, was made, but it is common ground that in fact this charterparty related to the s.s. *Belfri* and not to the *Beldis*, and it was upon that basis that the appellants were permitted to intervene in the suit.

By agreement an issue was submitted to the court in the following terms: "We, the plaintiffs and the interveners in the above named action herewith submit the following sole issue to be tried by this Honourable Court, pleadings being waived, 'Whether the plaintiffs' action in rem against the s.s. *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the s.s. *Belfri* being a ship belonging to the same owners.' The said parties agree that in the event of the question raised in this issue being answered in the affirmative, there shall be judgment for the plaintiffs with costs, and in the event of the question raised in this issue being answered in the negative, there shall be judgment for the interveners with costs."

The issue, therefore, raised the important question whether an action in rem in a county court having Admiralty jurisdiction could be based upon the arrest of property of the defendant owners other than that in respect of which the cause of action arose. This was the sole point argued before the county court judge, who decided that an action in rem against the s.s. *Beldis* was maintainable.

The argument in this Court proceeded on the same lines. In the course of the argument, however, we directed attention to the question whether the issue was not based on a misconception, inasmuch as it asserted as a fact that the

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plaintiffs' claim in the action arose out of a charterparty, whereas the plaintiffs' cause of action appeared not to be upon the charterparty at all, but upon an award, although the submission to arbitration was to be found in the arbitration clause of a charterparty. Having regard to the fact that the parties had agreed upon the framing of the issue, neither Mr. Miller nor Mr. Bateson betrayed any marked enthusiasm for this point, though they both recognised that no agreement of the parties could give this Court jurisdiction to deal with a point, however interesting and important, which did not arise upon the actual facts of the case. Mr. Miller, however, argued that, if this Court had no jurisdiction to deal with the appeal, the plaintiffs were entitled to hold the judgment in their favour by virtue of the express agreement in the issue. This argument appears to me to be quite untenable. If the truth of the matter is that the plaintiffs' cause of action is nothing but a common law claim upon an award it would be impossible, nor has Mr. Miller attempted, to contend that the Admiralty process in rem would be available, whether the property against which the action was directed was or was not the very thing in respect of which the cause of action arose. But the county court judge purported to be dealing, as a judge, with an Admiralty action in rem, and it seems to me to be quite impossible to hold, if the foundation of that jurisdiction was lacking, that he unconsciously assumed the burden of a private arbitration between the plaintiffs and the interveners. I am of opinion, for reasons which I will proceed to give, that this point is fatal to the jurisdiction of the county court judge, and consequently of this Court, notwithstanding the agreed wording of the issue. But in case I am mistaken in this view, and as the validity of the arrest is at the root of the proceedings and raises a point of great importance which has been very well argued by counsel on either side, I propose also to state my reasons for thinking that the judgment of the county court judge cannot in any event be supported. Our decision on this point will also have an important bearing on the question of costs.

Now the importance of ascertaining whether the plaintiffs'

claim in the action did or did not, in the words of the issue, "arise out of a charterparty of the s.s. *Belfri*, being a ship belonging to the same owners as the s.s. *Beldis*," will be seen upon a consideration of one of the statutes on which the jurisdiction of the county court in Admiralty is founded.

By s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, it is enacted, as follows:—"2. Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: (1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship . . . . provided the amount claimed does not exceed three hundred pounds"; and by s. 3: "The jurisdiction conferred by this Act and by the County Courts Admiralty Jurisdiction Act, 1868, may be exercised either by proceedings in rem or by proceedings in personam."

Mr. Miller insisted, and the argument is valid whether it tells for or against him, that the jurisdiction of a county court is defined for the present purpose by this statute. It is not suggested that the claim is covered by any other words in the section. Unless, therefore, it can be shown that the plaintiffs' claim arose out of an agreement made in relation to the use or hire of a ship, it cannot be the subject of an Admiralty action in rem in the county court. There was in fact no evidence before the county court judge as to the nature of the dispute arising under the charterparty of the *Belfri*, but the arbitrator's award has been put in before us, and I am prepared to assume that both the claim on which he gave his award in favour of the plaintiffs, and the counterclaim which he dismissed, arose in respect of matters relating to the use or hire of the *Belfri* under the charterparty. In other words, I am prepared to assume that, if those same matters had been the actual subject of the litigation before the county court judge, *The Alina* (1) would have been decisive to show that he had jurisdiction in Admiralty. But in my opinion the claim in this action was not based upon that foundation at all. It was an action upon the award. The award does

(1) 5 Ex. D. 227.

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not in fact show upon its face what was the nature of the claim made by the plaintiffs ; nor is there any reason why it should do so, though incidentally it happens to show the nature of the counterclaim, which was dismissed. The particulars of the claim contain no reference to the nature of the dispute, or disputes, arising under the charterparty. This is perfectly correct, because it is no part of the cause of action upon an award to show what was the nature of the dispute. All that the plaintiff has to prove is that certain matters in dispute have been submitted to an arbitrator and that he has made his award in the plaintiff's favour. As a matter of pleading it is unnecessary and, as I think, irregular to specify the nature of the dispute : see Bullen and Leake, Precedents of Pleading, 3rd ed., pp. 71–74. The modern edition of that classic follows the same precedent : see the 9th ed., pp. 86–89. Quite plainly the cause of action is founded, in the summons in this case, upon the award itself, and has no relation to the original dispute which gave rise to the arbitration. That being so, I should not be prepared to hold, even if the matter were free from authority, that a claim upon an award held under the arbitration clause in a charterparty is a claim arising out of any agreement made in relation to the use or hire of a ship. I think that it is a common law claim upon an award and nothing else. It may be that, as the defendants are out of the jurisdiction, this means that the award is difficult of enforcement, whether by action or by proceedings under s. 12 of the Arbitration Act ; but that circumstance affords no ground for bringing an Admiralty action in rem in respect of a common law claim.

This view of the matter is supported, even if it is not concluded, by the decision of the Court of Appeal in *R.* v. *Judge of City of London Court.* (1) This case, which is also of great importance upon the other point, decided that no greater jurisdiction, except with regard to charterparties, was conferred upon county courts by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, than that which was possessed by the Admiralty Court itself. The point at issue

(1) [1892] 1 Q. B. 273, 286, 291.

in that case was whether an Admiralty action lay in respect of the negligence of a pilot. There could be no question but that a common law action would lie (see per Lord Esher M.R.), but the claim in such an action would then have been limited to 50*l.*, whereas if the Admiralty jurisdiction was available the limit was 300*l.* There would, of course, as was pointed out in the judgments, be other distinctions between the two jurisdictions resulting from the difference between the Admiralty and common law doctrines as to the distribution of blame. The plaintiff relied on the words "and also as to any claim in tort in respect of goods carried in any ship," which are also contained in sub-s. 1 of s. 2 of the Act of 1869, part of which I have already quoted. In his judgment, Lord Esher makes it quite clear that he was prepared to hold that the Admiralty jurisdiction of a county court extended to a claim upon a charterparty only because he was bound by *The Alina* (1) so to hold; but he said that he would follow that case so far as it actually went, but not one inch further. With this exception the Court decided that the Admiralty jurisdiction of a county court was co-extensive with that of the Admiralty Court itself. That being the inch to which plaintiffs in a county court are entitled, it is not difficult to imagine what Lord Esher would have said about the present attempt to take an ell. However that may be, I am not prepared to hold that a claim upon an award made under the arbitration clause of a charterparty is within the words "any claim arising out of any agreement made in relation to the use or hire of any ship."

Assuming, however, that I am wrong, and that the claim upon this award comes within the Admiralty jurisdiction of the county court, there remains the question, raised by the issue, whether the action in rem can be directed against property of the defendant owner other than that in respect of which the cause of action arose. I have some difficulty in understanding what, in relation to a claim upon an award, the res would actually be. But that may be said to be immaterial because it is certain that the ship actually arrested,

(1) 5 Ex. D. 227.

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the s.s. *Beldis*, could not possibly be the res connected with the cause of action. The learned county court judge was invited to decide this issue upon a passage in the judgment of the Court of Appeal in *The Henrich Björn.* (1) It is evident from his judgment that, having regard to his own considerable experience in Admiralty, he would probably have decided the issue the other way if he had not felt himself bound by the particular passage in the judgment in *The Henrich Björn.* (1) The passage is as follows: "But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised? The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm: *The Charkieh* (2); see also per Dr. Lushington, *The Alexander Larsen.* (3)

"But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding in rem which perfects the inchoate right relates back to the period when it first attached: 'the maritime lien travels with the thing into whosesoever possession it may come': *The Bold Buccleugh* (4); and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings ad fundandam jurisdictionem; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm."

(1) 10 P. D. 44, 53, 54.
(2) L. R. 4 A. & E. 59, 91.
(3) 1 W. Rob. 288, 294.
(4) 7 Moo. P. C. 267, 284, 285.

Mr. Bateson admitted that this passage was decisive against him, but argued that it was obiter, and that in any case it was wrong. Seeing that the decision is already fifty years old it would be a strong thing to ask this Court to differ from the statement of the law contained in the passage I have quoted, if it was, as Mr. Miller contended, an integral part of the decision itself. It is therefore necessary to consider whether this passage was or was not obiter, and to examine the facts in that case, in order to see what the point was. The claim was for necessaries, and the cardinal fact was that at the time when she was arrested the *Henrich Björn* had been sold to parties who were complete strangers to the cause of action. Her former owner had entered into an agreement in writing in respect of the supply of the necessaries. It was attempted, unsuccessfully, to assert that this agreement was a bottomry bond; alternatively it was argued that there was a maritime lien on the ship in respect of necessaries. If there were a maritime lien the ship would, of course, be subject to the lien even in the hands of the new owners; but it was held that there was no maritime lien for necessaries, though it was recognized that a claim for necessaries would give a right to seize the ship for which the necessaries had been supplied in an action in rem against owners on whose behalf the debt had been incurred. This right, however, did not relate back so as to be available against strangers to the claim for necessaries to whom the property in the ship had passed before action brought. In other words, when once the question whether the particular agreement amounted to a bottomry bond, which for present purposes is irrelevant, was out of the way, the only question remaining for decision was whether the supply of necessaries gave rise to a maritime lien. If not, the arrest of the *Henrich Björn* could not be justified, since at the material date—namely, the commencement of the action, although she was the res in relation to which the cause of action arose, she was not a res belonging to the defendant owner. It follows that it was quite unnecessary to consider whether property of the owner, other than the ship itself, was liable to arrest in an action in rem. The passage relied upon

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cannot, therefore, be regarded as a binding statement of existing law on this point, though naturally a statement of the law by a Court, composed as that Court of Appeal was, must carry great weight.

It is, however, material to notice that Fry L.J. in the passage quoted, couples with the arrest of the ship in question, or any other chattel, the arrest of the person of the defendant, if within the realm, and proceedings against the real property of the defendant within the realm. Now the last known instance of the foundation of Admiralty jurisdiction by the arrest of the person was in 1780: see the passage in Dr. Lushington's judgment in *The Clara* (1) quoted below. As regards the statement that the Admiralty jurisdiction was founded by proceedings against the real property of the defendant, this appears to be open to considerable doubt, as appears from the Introduction to the 3rd Edition of the late Mr. Roscoe's book on Admiralty Practice, p. 43, note (*y*). With this qualification as regards proceedings against the real property of the defendant, I have no doubt that the passage relied upon is an accurate statement of the practice of the old Admiralty Court in former days. As regards arrest of the person, I propose to leave the matter where Dr. Lushington left it in *The Clara* (1), with these further observations: that *The Clara* was tried in 1855, fifteen years after the Acts of 1840 establishing the High Court of Admiralty; that no one would know better than Dr. Lushington what was the practice prevailing in Admiralty at the time when those Acts were passed; and that it is common ground that since that decision in 1855 there is no trace of any attempt to found an Admiralty action by the arrest of the person of the defendant. As regards the arrest of property, there can, I think, be no doubt that the old Admiralty Court asserted the right to found jurisdiction by the arrest of any property of the defendant within the jurisdiction of the Admiral. This appears quite clearly from the Introduction by Mr. Marsden to the Select Pleas in the Court of Admiralty, published by the Selden Society, vol. i., p. lxxi., which was relied on by Mr. Miller. The

(1) Swa. 1, 3.

passage, of which the marginal note is "Points of law and practice; arrest" reads as follows: "The following points may be noted as to the practice of the Court and the law which it administered: The ordinary mode of commencing the suit was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the admiral's jurisdiction at the time of arrest. As pointed out below, the admiral at this period asserted and exercised a jurisdiction over all public streams, rivers, and waters, whether the same were within the body of a county or not. Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited 'at'—*apud*—the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the res."

At p. 40 of the Introduction to the 3rd ed. of Roscoe's Admiralty Practice, the learned author cites Clerke's "Praxis" to the effect that "If the defendant could not be personally arrested in a civil cause by reason of being out of the kingdom or because he had absconded and he had any goods, wares, ship, or part of a ship, or vessel upon the sea, or within the flux and reflux of the sea, a warrant could be taken out to arrest such goods or such a ship belonging to the defendant debtor, in whose hands soever they were; and upon the attachment of such goods the debtor was cited specially in respect of the goods to appear on such a day to answer the plaintiff in a certain maritime and civil cause." He proceeds (p. 44) to show that this process was a proceeding in rem in the sense that, if the defendant did not appear the suit could go on without in any way touching the person, and that by

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the operation of the judgment the defendant was deprived of his property in the chattel, unless he appeared, in which case the proceedings went on in the ordinary course as an action in personam. He attributes the development of this form of action to the prohibitions to which the old Admiralty Court was subjected by the Courts of common law if it attempted to act in personam. But in my opinion it would be most unsafe to arrive at any conclusion as to the scope of Admiralty jurisdiction at and after the passing of the Acts of 1840, without bearing in mind that the old Admiralty Court was consistently asserting claims to exercise jurisdiction, which the Courts of common law as consistently prohibited. Even with regard to the claim which was the subject-matter of the *R.* v. *Judge of City of London Court* (1), if the Select Pleas in the Court of Admiralty had been published at the time when Lord Esher gave his judgment I doubt whether he would have asserted as emphatically as he does that " from the beginning of time until now no one case is to be found in the Admiralty Court of any such action being entertained against a pilot." There are in fact the records of two such cases in that volume. Again, contrasting the English and American Courts of Admiralty, the learned Master of the Rolls asserted that it was undoubted that no jurisdiction over a policy of insurance in respect of ships or goods has ever been attempted in England. But the patent of the Admiralty judge is set out in an article by the late Lord Phillimore under the title of The High Court of Admiralty, in the Encyclopædia Britannica, 11th ed., vol. i., pp. 203–4. The patent had been, in form, substantially unchanged from Tudor times, though the significant words " the Statutes to the contrary notwithstanding " do not appear in the more modern patents. Jurisdiction in respect of policies of assurance is expressly mentioned ; as is also the widest possible jurisdiction to arrest goods: see *Warner & Wheler*. (2) But it is generally recognized that the patent was extravagant in its claims. A history of the struggle over

(1) [1892] 1 Q. B. 273, 293, 298.
(2) (1542) Select Pleas in the Court of Admiralty, vol. 1, 117, 220.

jurisdiction is set out by Mr. Roscoe in the Introduction to which I have already referred. It may be assumed that the Admiralty Court did not submit to the limitations imposed by the Court of Common Law without a protest. For example, a forcible expression of the point of view of the civilians is to be found in the remonstrance by Dr. David Lewis, the Admiralty judge of Queen Elizabeth's time, which can be seen in the article on Doctors' Commons in Stow's Survey of London. Again, the Black Book of Admiralty contains an ordinance directing an inquiry to be made concerning "all those whoe doe sue any merchant, marriner, or other person whatsoever at common law of the land for any thing of auntient right belonging to the maritime law," and directing that on conviction the plaintiff shall be "fined to the king for his unlawfull and vexatious suite, and besides shall withdraw his suite from the common law and shall bring it in the admiralty court, if hee will prosecute any further": see the reprint in the Rolls Series, vol. i., p. 83. It is, however, unnecessary to elaborate this aspect of the matter. The point of Lord Esher's judgment in *R.* v. *Judge of City of London Court* (1) is that, even if a particular jurisdiction was asserted by the Admiralty Court, the assertion must be considered in light of the prohibitions from time to time imposed by the Courts of common law, to which it was in those days always subject. It must always be remembered that it was not until the Acts of 1840 that the High Court of Admiralty was established as a court with a jurisdiction defined by statute, and a judge whose salary was chargeable upon the consolidated fund, and who was given in express terms all the privileges and protection appertaining to the judges of the courts of common law. In my opinion the only safe rule is to assume that Parliament intended that the jurisdiction and practice then existing, but as extended and improved by the specific enactments of the statute, should thenceforward be the jurisdiction and practice of the Admiralty Court. It is admitted that the industry of counsel has not resulted in finding a single instance in which, either between the passing of the Acts of 1840 and the decision in

(1) [1892] 1 Q. B. 273.

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The Henrich Björn (1) in 1885, or from then until the present time, property, other than that directly connected with the cause of action, has been arrested as the res in an Admiralty action. On the contrary, as Scott L.J. pointed out in the course of the argument, one aspect of the subject under discussion in *The Henrich Björn* (1) is eloquent to show that no such right was believed to exist. In the passage quoted above from the Introduction to the Select Pleas in Admiralty, Mr. Marsden speaks of the modern doctrine of arrest being founded on a maritime lien. This doctrine is clearly expressed in the opinion of the Privy Council given by Sir John Jervis in *The Bold Buccleugh* (2), where it is laid down that "a maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process." This view as to the coincidence of the maritime lien and the action in rem was expressly disapproved in the House of Lords in *The Henrich Björn* (3) see in particular the speech of Lord FitzGerald. But the very fact that in 1851 it should be possible for the Privy Council to lay down that the action in rem was exactly co-extensive with the maritime lien, which was said to be its foundation, shows that no one then contemplated that an action in rem could be founded on the arrest of property of the defendant owner unconnected with the circumstances giving rise to the lien.

This brings me to a consideration of the decision of the House of Lords in *The Henrich Björn* (3), affirming the Court of Appeal. In the opening paragraph of his speech Lord Watson used the following words :—

"The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattel

(1) 10 P. D. 44.
(2) 7 Moo. P. C. 267, 284.
(3) 11 App. Cas. 270, 276, 285, 286.

in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognizes. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien ; and in that case the attachment of the ship, by process of the Court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment.

" The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own lâches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action in rem unless at the time of its institution the res is the property of his debtor."

In this passage Lord Watson, while stating that a maritime lien does give rise to an action in rem, and recognizing that an action in rem is also available in respect of maritime debts which are not secured by lien, is engaged in showing that in the one case the action survives, and in the other case does not survive, change of ownership of the ship. This statement is not of course quite exhaustive, because under neither heading need the res necessarily be a ship : it may be the cargo, or the proceeds of the ship or cargo, and arrest of the cargo may include arrest of the freight. But it is quite plain that in stating the modern practice of the Admiralty Court Lord Watson is regarding the res as being the very thing in respect of which the maritime debt, or the maritime lien, as the case may be, has arisen. There is not a hint in the passage quoted of the bringing of a maritime action against anything other than that which gives rise to the cause of action. It is quite true that in the House of Lords, as in the Court of Appeal,

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it was unnecessary, once it was decided that there was no maritime lien for necessaries, to discuss all possible aspects of the action in rem. But of the two statements of the law, both of which are obiter, this is by the higher tribunal. Even if it does not purport to be exhaustive, I am convinced that it is correct as a statement of Admiralty jurisdiction and practice in recent times and I propose to follow it. This view, in my opinion, is supported by *The Dictator*. (1) The point for decision in that case was whether in an action in rem, in which bail had been given to avoid an actual arrest, the res was or was not subject to execution by writ of fieri facias in respect of a sum recovered in excess of the amount of the bail. Sir Francis Jeune held that the ship was not exempt from execution. After reviewing the early history of the action in rem the learned President says : " Actions beginning with arrest of the person became obsolete in practice, as Dr. Lushington says in *The Clara* (2) in the last century, the last recorded instance being in 1780 ; and arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would still seem to be permissible, per Fry L.J. in *The Henrich Björn*. (3) On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of the attachment, of which Lord Watson speaks in *The Henrich Björn* grew up." (4)

It will be observed that though Sir Francis Jeune used the words " rare or obsolete " in connection with arrest of property, he evidently regarded arrest whether of the person or property, merely for the purpose of compelling appearance, as being in the same category, and only mentioned either as being theoretically permissible because of the dictum in the Court of Appeal in *The Henrich Bjorn*. (4) It is unlikely that if there had been any other subsisting foundation for the arrest of property unconnected with the cause of action Sir Francis

(1) [1892] P. 304, 313.
(2) Swa. 1, 3.
(3) 10 P. D. 44, 53, 54.
(4) 11 App. Cas. 270, 277.

Jeune would not have said so. It is worthy of note that Lord Watson founds his statement as to the nature of that kind of action in rem, which is unconnected with a maritime lien, upon recent Admiralty practice.

In the 3rd edition of Williams and Bruce, "Admiralty Practice," page 249, the following passage occurs: "Admiralty proceedings may be *in rem* or *in personam*. By proceedings *in rem* the *property in relation to which the claim has arisen* [the learned President's italics], or the proceeds of such property when in Court, can be proceeded against, and made available to answer the claim. This method of proceeding is peculiar to Courts exercising Admiralty jurisdiction, and generally it is in order to avail themselves of the advantages thus afforded that suitors resort to their jurisdiction. But in cases where the plaintiff does not desire to proceed against the property, the method of proceeding *in personam* may be resorted to."

In the late Lord Phillimore's article on Admiralty jurisdiction in volume I. of the Encyclopædia Britannica, 11th ed., p. 206, it is plainly assumed, though not expressly stated, that the res must be that in relation to which the claim has arisen. Finally in paragraphs 94 and 95 of the title "Admiralty" in the 2nd edition of Halsbury's "Laws of England," for which Lord Merrivale and Langton J. are responsible, it is stated definitely that both arrest of the person and arrest of any property belonging to him in tidal waters, have become obsolete. Even if these statements of the law are not, strictly speaking, authorities, they make a formidable collection of views about the modern law and practice held by those best qualified to know what the law and practice are. But Mr. Miller argued that once it was shown that the old law and practice were in his favour it was immaterial that text writers, however eminent, declared that the law and practice had become obsolete. It must be shown how and why they had become obsolete. I am inclined to think that the solution is to be found in the passage from the Introduction to the Select Pleas in Admiralty quoted above. It will be recalled that Mr. Marsden draws the conclusion that arrest was mere

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procedure, and that its only object was to obtain security that the judgment should be satisfied. It may be that this was not the only, or indeed the primary, object, and that the original object of arrest, as Mr. Roscoe suggested in the Introduction to which I have already referred, was to found jurisdiction at a time when any attempt to assume jurisdiction in personam was prohibited by the common law courts. It would appear, however, that even before actions in personam were recognized by the statutes to which I am about to refer, this method of procedure was adopted in the old Admiralty Court. In *The Milan* (1) Dr. Lushington says that " By the ancient law of the Admiralty with respect to damage by collision, whether the damage was occasioned to ship or to cargo, the mode of proceeding was twofold, either by an action in rem or by an action in personam."

There are indications of this in the text-books : see Williams and Bruce, 3rd ed., p. 321, and Roscoe, 3rd ed., p. 45, note (*c*) : but it is difficult to define when this practice grew up or whether, or to what extent, it was recognized by the common law courts. Probably the action in personam developed out of the original practice of founding jurisdiction by arrest of the person : see per Jeune P. *Cargo ex Port Victor* (2), and grew as the latter fell into desuetude.

With regard to the statute law, there is no mention in the Acts of 1840 of either form of action. The first statutory reference to an Admiralty action in personam appears to be contained in s. 13 of the Admiralty Court Act, 1854. Seeing that the Act deals almost entirely with procedure, and that the subject-matter of the section is not referred to in the preamble, which merely recites the expediency of resolving doubts about the administering of oaths and for providing for the collection of fees, it is unlikely that s. 13 was regarded as effecting any very revolutionary change in the law or practice. The section reads as follows : " In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship, or freight, goods, or other effects whatever, it shall not be necessary to the

(1) (1861) Lush. 388, 397. (2) [1901] P. 243, 249.

institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said Court may proceed to hear and determine the suit, and may make such order in the premises as to it shall seem right."

The right to issue a monition in personam against the owner or owners is given, but the right to proceed in rem is not taken away. It is clear, however, that in the case of arrest, the ship, freight, goods or other effects to be arrested are those in relation to which the cause of action arises. The words " cause or right of action against any ship, or freight, goods, or other effects whatever " are perfectly apt to describe the arrest of the ship, freight, cargo, tackle and other apparel connected with the ship in respect of which the cause of action arose, but would be inapt in connection with a supposed right to arrest any other property of the defendant owner. Moreover the rules, orders and regulations made by Order in Council, in pursuance of the Acts of 1840 and 1854, on the 29th November, 1859, and the forms, the use of which is thereby enjoined (see Coote's Admiralty Practice, 2nd ed., p. 190 et seq.) lead to the same conclusion. When, therefore, by s. 35 of the Admiralty Court Act of 1861 Parliament enacted that the jurisdiction conferred by that Act upon the High Court of Admiralty might be exercised either by proceedings in rem or by proceedings in personam it was merely enlarging the jurisdiction, but was not changing the forms of action by which that jurisdiction might be exercised.

Arrest, either of person or property, has long ceased, therefore, to be necessary in order to found jurisdiction. Nor is arrest of property, other than the thing in relation to which the claim arises, necessary in order to obtain security that the judgment shall be satisfied. It is true that, unless the defendant appears to an action in rem, satisfaction of the judgment is limited to the value of the res, but if the

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defendant appears, the action proceeds in personam as well as in rem. In such a case, as where the action is brought in personam in the first instance, execution can issue against any property of the defendant, including any surplus value of the res over and above the amount for which bail has been given: see *The Dictator* (1), *The Gemma* (2), *The Joannis Vatis* (No. 2) (3) In my opinion arrest of property unconnected with the claim was merely procedural, and the maxim "cessante ratione cessat ipsa lex" applies. I for one am not prepared, to quote Lord Esher's words in *R.* v. *Judge of City of London Court* (4) to "re-open the floodgates of Admiralty jurisdiction" upon the public, especially when that public is an international public and I can see that the innovation would be disastrous to the prestige of the Court.

Mr. Miller, however, submitted that even if it was established that in the Probate, Divorce and Admiralty Division the right to proceed in rem is limited to the res which gives rise to the cause of action, that cannot apply to the statutory jurisdiction given to a county court. He relied in particular on the fact that the Act of 1869, as construed in *The Alina* (5) gave to county courts an Admiralty jurisdiction in respect of charter-parties, which plainly is not possessed by the Probate, Divorce and Admiralty Division. By s. 3 of the Act this extended jurisdiction may be exercised by proceedings in rem as well as in personam. Therefore, he argued, the meaning of the words "proceedings in rem" in the Act of 1869 cannot be restricted to the process in rem as understood in the High Court. I am not convinced by this argument. Sect. 3 of the Act of 1869 merely repeats, with reference to the county court, the corresponding enactment with reference to the High Court of Admiralty contained in s. 35 of the Admiralty Court Act, 1861, which as has already been shown, was merely declaratory of the effect of s. 13 of the Act of 1854. I see no ground for supposing that the legislature meant to enact that the nature of the process should differ in the two cases, even if the causes

(1) [1892] P. 304.
(2) [1899] P. 285.
(3) [1922] P. 213.
(4) [1892] 1 Q. B. 273, 299.
(5) 5 Ex. D. 227, 238.

of action in relation to which it could be employed were more extensive in the one case than in the other; see per James L.J. in *The Alina*. (1) In support of his construction of the statute, Mr. Miller also relied upon Dr. Lushington's judgment in *The Alexander Larsen*. (2) I do not think, however, that that judgment really assists his argument. The question there was whether the Act of 1840, which gave the High Court of Admiralty jurisdiction to decide all claims for, amongst other things, necessaries supplied to any foreign ship, enabled the Court to try a claim for such necessaries which had arisen before the passing of the Act. Dr. Lushington said in effect that the action could not have been entertained before the statute, because it would probably have been prohibited, though it was plainly within the original scope of the maritime law, but that as the legislature had recognised the cause of action, and there were no words prohibiting the Court from entertaining, after the passing of the statute, a claim which had arisen before the statute, there was jurisdiction to try the action. Whether the actual decision was or was not in accordance with the general principles governing the construction of statutes, it is unnecessary to inquire, as it does not seem to me to touch the present point. What is important is that in a decision given in the year after the setting up of the High Court of Admiralty Dr. Lushington uses these words (3): "The statute therefore simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred."

As this passage is one of the foundations of the dictum in *The Henrich Björn* (4) in the Court of Appeal it is worth noting that it is a little surprising, having regard to what he said fourteen years later in *The Clara* (5) that Dr. Lushington should be speaking in 1841 of arrest of the person as a lawful mode of exercising jurisdiction; but it is significant that even

(1) 5 Ex. D. 227, 238.
(2) 1 W. Rob. 288, 293.
(3) Ibid. 294.
(4) 10 P. D. 44.
(5) Swa. 1.

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in connection with arrest of the person, he speaks of the arrest not of " his " property but of " the " property, by which the context seems to show that he means the property in relation to which the claim has arisen. This appears even more clearly from the relevant passage in his judgment in *The Clara* (1) where he says :—" In the Admiralty Court there were two modes of proceeding—by arrest of the person, or arrest of the ship. The proceeding by arrest of the person has now for many years been obsolete ; I cannot exactly say how long, but I think there was a precedent in 1780 ; the amount of damage done was the only limit to the amount that might be recovered. The proceeding by arrest of the ship—or in rem, as it is called—was the most sure, for to the extent of the value of the ship the plaintiff would be sure of any amount of damage decreed."

But Mr. Miller also relied on Mr. Carver's argument in *The Zeta* (2), as being a statement by an eminent Admiralty practitioner of the existing law. I think, however, that we are bound by the decisions both in that case and in the case of *R.* v. *Judge of City of London Court* (3) followed, as they recently were, by a Divisional Court in *The Champion* (4) to hold that, except with regard to the special case of charter-parties, the Admiralty jurisdiction given to county courts is that which was then exercised by the High Court of Admiralty. In this connection the proviso to s. 8 of the Maritime Conventions Act, 1911, is significant. This section, which applies expressly to all courts exercising Admiralty jurisdiction in this country, imposes a limitation of two years upon any action to enforce any claim against a vessel or her owners, (that is to say, upon an action whether in rem or in personam) in respect, amongst other things, of any damage or loss to another vessel, her cargo or freight, or any property on board her caused by the fault of the former vessel, or in respect of any salvage services, but provides that " any Court having jurisdiction to deal with an action to which this section relates . . . . shall, if satisfied that there has not during such period been any reasonable

(1) Swa. 1, 3.
(2) [1893] A. C. 468, 475.
(3) [1892] 1 Q. B. 273.
(4) [1934] P. 1.

opportunity of arresting the defendant vessel within the jurisdiction of the Court....extend any such period to an extent sufficient to give such reasonable opportunity." It is true that this section does not cover all cases in which proceedings in rem are available: but, between them, the two classes of case mentioned form the majority of Admiralty causes. It is improbable that Parliament would have enacted this proviso with regard to the arrest "of the defendant vessel" if in an Admiralty action in a county court there was also jurisdiction to arrest any other property of the defendant owner within the realm.

For these reasons, like Lord Esher, I find it impossible to suppose that in 1869 Parliament meant to give to county courts any jurisdiction wider, with the exception mentioned, than it had conferred on the High Court of Admiralty in 1840. The appeal also succeeds, therefore, on the point actually argued before the learned county court judge.

As regards costs, the respondents bear the responsibility for starting this misconceived litigation with the original arrest of the ship. It is true that by concurring in the issue, which is also misconceived, the appellants have enhanced the costs. But I think that costs should follow the event. The appeal will be allowed with costs here and below. The costs in the county court will be on the "C" scale.

SCOTT L.J. This appeal is from a judgment of the county court judge for Monmouthshire sitting at Newport on an issue agreed between the interveners in the action and the plaintiffs on the record, in which the interveners challenged the right of the plaintiffs to proceed in rem against the s.s. *Beldis* belonging to the defendants. The action was brought in that court in its Admiralty jurisdiction by a plaint in rem dated April 5, 1935, against the s.s. *Beldis*. The particulars of claim were expressed to be for "money due and payable by the defendants, the owners of the s.s. *Beldis*, to the plaintiffs under an award dated January 24, 1935, in an arbitration held by virtue of a clause in a charterparty dated July 13, 1933, and made between the defendants and the plaintiffs,

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whereby the arbitrator awarded to the plaintiffs the sum of 27*l.* 4*s.* 6*d.* composed of an item of 19*l.* 7*s.* 6*d.* for money due in account and an item of 7*l.* 17*s.* for costs." Judgment was in default of appearance signed for the amount claimed.

After judgment Messrs. Lambert Bros., Ld., sought to intervene. By their affidavit they stated that they were mortgagees of the s.s. *Beldis* under a mortgage for 20,000*l.* (sterling) registered at Oslo on May 25, 1929; they challenged the plaintiffs' right to proceed in rem against that ship, asked leave to enter an appearance on the grounds (inter alia) that the arrest of the s.s. *Beldis* was illegal, and that the proceedings were wrongly taken in rem, and prayed that the judgment signed in the action in their absence might be set aside. An issue was agreed between them and the plaintiffs in the following terms:

[His Lordship read the terms already set out.]

The county court judge tried this cause and held on the authority of certain dicta of the Court of Appeal in *The Henrich Björn* (1) that the contention of the interveners was wrong and gave judgment against them. The interveners then appealed to this Court, the plaintiffs being respondents.

On the hearing of the appeal the award was produced to us and it appeared on its face that the charterparty in question was made, not in respect of the s.s. *Beldis*, the ship against which the action in rem was instituted, but in respect of a different ship altogether, also belonging to the defendants, namely the s.s. *Belfri*. It further appeared from the award that the said sum of 19*l.* 7*s.* 6*d.* was a balance due to the plaintiffs in account, being in fact, as we were informed by counsel, an overpayment of chartered hire of the s.s. *Belfri*.

The phraseology of the issue indicates that in the view of both parties the plaintiffs' action, although based on the award, was nevertheless a claim which "arose out of an agreement made in relation to the use or hire of a ship," because the arbitration had been held pursuant to an arbitration clause in the charterparty of the s.s. *Belfri* and because the dispute before the arbitrator "had arisen out of" that agreement.

(1) 10 P. D. 44.

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In these circumstances two questions call for decision :

Q. (i). Assuming that " the cause " was one which could have been prosecuted in rem against the s.s. *Belfri* under s. 3 of the County Courts Admiralty Jurisdiction Act, 1869, as a cause which " arose out of an agreement made in relation to the use or hire of a ship " within the meaning of s. 2, sub-s. 1, of that Act, could it be prosecuted in rem against another ship belonging to the same owners, the s.s. *Beldis*, with which the said charterparty had no concern ?

Q. (ii). Is the above assumption legally sound, when the plaintiffs were suing not on the charterparty but on an award of an arbitrator, merely because the arbitration had been held pursuant to an arbitration clause in such an agreement ? Do the words " cause arising out of an agreement, etc." cover such a cause of action ?

In the court below the parties to the issue were in conflict over Q. (i), but Q. (ii) was not discussed, both sides apparently being in agreement in thinking that the court could entertain such an action on an award as an Admiralty cause in rem. No argument was addressed to us on this point until we directed the attention of counsel to the doubt as to whether the county court had any Admiralty jurisdiction over such an action.

It is convenient to dispose of Q. (ii) first.

The answer depends upon the true interpretation of the Act of 1869, construed in the light of the state of the law at the time when the Act was passed. Are the words of s. 2, sub-s. 1, wide enough and clear enough to cover this action ? Voluntary arbitrations at that date were governed by the provisions of the Acts of 9 & 10 Will. 3, c. 15, and 1 & 2 Vict. c. 110, s. 18, and the Common Law Procedure Act, 1854. Then, as now, an action lay at common law to enforce an award (see Bullen & Leake, 3rd ed., p. 71 et seq. ; Russell on Arbitration, 3rd ed. (1864), p. 505) ; but the only other means of enforcing an award was either (*a*) by making the submission a rule of the Court of Queen's Bench—with the consequence that a party acting in disobedience to the award could be attached for contempt (Common Law Procedure Act,

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1854, s. 17, and s. 1 of the Act of William; see also Russell, 3rd ed., part III., ch. V., p. 565 sqq.); or (*b*) by obtaining from one of the three common law courts a rule absolute for payment of the sum awarded (see Judgments Act, 1 & 2 Vict. c. 110, s. 18; Russell on Arbitration, 3rd ed., at p. 612, and *Jones* v. *Williams* (1) there cited).

This being the state of the law about the enforcement of "voluntary" awards, it was unlikely that an action on an award would in 1869 be assigned by Parliament to the High Court of Admiralty: and in the absence of clear words it would be wrong so to interpret the Act even assuming the words to be wide enough to include it. But the words of the statute "a cause arising out of an agreement relating to the use or hire of a ship" not only are not clear in the sense supposed, but in my view for the following reasons cannot include it.

By the early part of the 19th century, as a result of the long war with the common law courts (to which I shall return in connection with Q. (i.)) the categories of "Admiralty causes" had become limited to damage, salvage, wages, bottomry, and certain other causes arising out of maritime events and affairs of which there was then in truth a fairly well-defined list. Indeed it was just because the jurisdiction in Admiralty had become thus restricted that the aid of the legislature had to be invoked in order to effect the extensions of it contained in the Admiralty Courts Acts, 1840 and 1861.

It is true that the Court of Admiralty was thereby given jurisdiction over several causes of action cognizable in either common law or Chancery Courts: but each one was defined in precise, plain and carefully guarded terms; and, in the case of those founded on contract, the cause of action was one directly based upon the maritime contract described in the section—e.g., towage and necessaries supplied to foreign ships (1840 Act, s. 6): necessaries to any ship anywhere (1861 Act, s. 5) and certain claims on bills of lading for damage, but each of the last two cases only if the shipowner was not domiciled in England and Wales. In my view it would be

(1) (1839) 11 Ad. & El. 175.

entirely wrong to hold that an action on an award arising indirectly out of such a maritime contract was included by the words of the above sections. Precisely the same reasoning applies to the language of the County Courts Admiralty Jurisdiction Act, 1868, with even greater force, since the assignment of Admiralty jurisdiction to county courts was a new departure, and in that Act made rather experimentally. By it certain county courts were given Admiralty jurisdiction to try a limited list of what the Act called "Admiralty" causes; and they were not given the full right of Admiralty procedure in rem, being authorized to arrest (otherwise than in execution) only if it was probable that "the ship or property to which the cause relates" would be removed out of the jurisdiction (s. 22). It is true that by s. 3 of the Act of 1869 the right of Admiralty procedure in rem was conferred for the purposes of both Acts, but there was no change in the method of describing the permitted field of Admiralty jurisdiction: there was merely an extension of the list of particular Admiralty causes, over which the court was to have jurisdiction.

With the above history of Admiralty jurisdiction both before and since 1840, it would in my judgment be plainly wrong to say that under s. 2, sub-s. 1, of the Act of 1869 a county court has Admiralty jurisdiction to entertain an action on an award upon a voluntary submission, merely because the arbitration was held pursuant to an arbitration clause in a charterparty for the reference of disputes arising out of that charterparty.

Q. (i). This conclusion is sufficient to dispose of the appeal and to show that the judgment of the learned judge cannot stand, but in case the above interpretation of the words "arising out of any agreement, etc." be held by the House of Lords to be wrong I give my conclusion and reasons on Q. (i) also. It is one of great commercial importance, for it applies to all proceedings in rem, whether in county courts or the Admiralty Division.

In many continental systems of law and procedure (e.g., in Germany, Sweden, Belgium, and to a certain extent in France) there is a right of arrest for founding jurisdiction and obtaining

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bail in respect of any ship or other property of a defendant although wholly unconnected with the cause of action sued on. But in England I have never heard of such an arrest, and I do not believe any attempt has ever been made here to exercise such a right in practice within the memory of any living practitioner in the Admiralty Court—until the plaintiffs in the present action made it. In my view there is no such right in English law to-day.

Mr. Miller for the respondents naturally relied strongly upon the expression of opinion in the Court of Appeal in *The Henrich Björn* (1), which appears in the judgment of the Court (composed of Brett M.R., Bowen and Fry L.JJ.) and delivered by Fry L.J. The learned Lord Justice there says in regard to the procedure in rem " the arrest need not be of the ship in question, but may be of any property of the defendant within the realm." That observation was, however, purely obiter. Apart from an unfounded contention of a bottomry bond which the Court rejected, the only question of law relevant to the decision of the case was whether a maritime lien attaches in English law to a valid claim for necessaries. That was necessarily the sole issue in that case, since the ship for which the necessaries had been supplied had passed by sale from the ownership of the shipowner for whom the necessaries had been supplied to that of new owners who had had nothing to do with the voyage when the necessaries were supplied. If there was a maritime lien the new owners took subject to the lien ; if there was no maritime lien their ship was free and the plaintiff had no right to arrest it in their hands. The opinion of the Court in *The Henrich Björn* (1) is entitled to great respect ; but it is not binding on us, and in my view the dictum is erroneous. My reasons are as follows.

There is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of two methods of procedure for bringing the defendant before the Court : (i.) the arrest of his person ; (ii.) the seizure of his goods. There is more than one case in the Selden Society's Select

(1) 10 P. D. 44, 54.

Pleas in the Court of Admiralty which illustrates the arrest of goods other than the goods or ship concerned in the particular cause of action, for the purpose of founding jurisdiction. But it seems to be equally clear that both methods had fallen into disuse before the beginning of the 19th century, probably as a result of the incessant war of jurisdiction waged by the common law courts on the Admiralty Court in the 16th and 17th centuries. A full account of this long quarrel is contained in the 3rd edition of Roscoe's Admiralty Practice, and that account may, I believe, be accepted as substantially accurate.

During the first half of the 19th century there emerges a fact of dominant significance. A belief had grown up in the minds of Admiralty practitioners that the ambit of Admiralty procedure in rem was co-terminous with the ambit of the maritime lien; that where there was a maritime lien the right to proceed in rem existed, and where there was no maritime lien the right to proceed in rem did not exist. This belief, strongly held and widely prevalent until judicially corrected, actually found expression in 1851 in the judgment of the Privy Council in *The Bold Buccleugh*, reported under the name of *Harmer* v. *Bell.* (1) There the Privy Council themselves said in the judgment:

"Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This

(1) 7 Moo. P. C. 267, 284.

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claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

The view thus expressed, that the right to proceed in rem was limited to those cases where a valid maritime lien was recognized in Admiralty law, was considered in the very case of *The Henrich Björn* (1), upon which the plaintiffs in the present appeal mainly rely, both in the Court of Appeal and in the House of Lords, and there finally negatived as wholly erroneous; but the fact that it was so long and so widely entertained throws much light on the contention raised in the issue before us. If everybody practising in Admiralty had a firm belief that in order to arrest you must have a lien, they must equally have been satisfied that where there was no lien you could not arrest. If they believed that the right of proceeding in rem was thus limited, it follows that they must have recognized the impossibility of arresting any ship other than the particular ship to which the cause of action related, since ex hypothesi there could be no lien over a ship wholly unconnected with the cause of action. They could never have supposed that *another* ship of the same owner could be arrested in a cause for, e.g., damage or salvage, because ex hypothesi no maritime lien for damage or salvage could possibly attach to any but the delinquent ship or the salved ship. This historical misconception is to my mind conclusive proof that during the period of its prevalence the universal practice was to treat the right of procedure in rem as applicable only to the ship or property to which the cause of action related, and that the archaic right of arresting *other* property of a defendant —i.e., other than that with which the cause of action was concerned—had before that period fallen wholly out of use, and become obsolete.

The complete absence of any reported case in the last 100 years, in which the present attempt to arrest a ship or property unconnected with the cause of action has ever been made

(1) 10 P. D. 44; 11 App. Cas. 270.

before, is, indeed of itself, almost conclusive that the procedure in rem was not regarded in the Admiralty Court as extending to such other ships or property, and from this fact too I draw the inference that it had ceased to be permissible.

And this view seems to me to be implicit in the language of Parliament in the County Court Admiralty Jurisdiction Act of 1868. The Act of 1869 is to be read as one with the Act of 1868 (s. 1). By s. 3 of the Act of 1869 the Court is empowered to exercise its Admiralty jurisdiction (under either Act) either in personam or by the ordinary Admiralty procedure in rem in respect of any causes within the combined Act. By s. 21, sub-s. 1, of the Act of 1868 the Admiralty jurisdiction thus conferred is locally limited to the district within which the vessel or property "*to which the cause relates*" is at the time when proceedings are commenced. These provisions justify two comments. In the first place they seem to pre-suppose the impossibility of applying the procedure in rem to any ship or property *unless the cause relates to it*: in other words it is almost a statutory recognition of the existing practice, which had then for long prevailed. In the second place, as the county court has no Admiralty jurisdiction beyond what is expressly conferred by the statute, its concomitant power to proceed in rem is equally confined, and it seems to me more consistent with sound interpretation to regard the procedural power as conferred in respect of the same res as that upon which the substantive jurisdiction is founded—namely, the res "to which the cause of action relates."

The language of The Maritime Conventions Act, 1911, to which the learned President has referred, is consistent with and supports the above conclusion. But the argument must not be pressed too far. The proviso to s. 8 which enacts a statutory limitation of two years for the bringing of collision and salvage actions, subject to a power in the Court to extend the time if there has been no reasonable opportunity of arresting the defendant ship within the jurisdiction, merely repeats art. 7 of the Convention—and that article was accepted with the above proviso by many continental nations who had

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in their codes of procedure the right of arresting property wholly unconnected with the cause of action and had no intention of altering their procedure; and the proviso has, since then, been put into force by several of them in their national legislation without any change being made in their method of procedure. The truth is that those Conventions were not intended by the High Contracting Parties to touch national laws of procedure. The late Lord Sterndale and I were delegates of the British Government at Brussels and conducted the negotiations and signed those Conventions; and we were alive to this wide difference between the procedural laws prevailing in many continental countries on the one hand and the British Empire on the other. The correct view of the proviso to s. 8 of the Maritime Conventions Act, 1911, is in my opinion therefore simply that it recognises and leaves unaltered the English Admiralty procedure in rem as it had existed for at least a century.

For the above reasons the conclusion seems to me plain that the respondents here, plaintiffs below, had no right to arrest the s.s. *Beldis* even if the cause did "arise out of the charterparty of the s.s. *Belfri*." My answer to Q. (i) is, therefore, also in favour of the appellants, the interveners.

The appeal ought to be allowed and judgment entered for them, with costs here and below; and the county court costs should, in my view, be upon scale "C."

SWIFT J. [after stating the facts already set out, the learned judge continued:]

The cause of action alleged is an ordinary common law claim for payment of money due under an award. Such a cause of action is not one of those upon which jurisdiction in Admiralty is conferred upon the county court by s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, nor is it a cause of action for which an action in rem could be brought, apart from the County Courts Act. In my view, the proceedings were quite misconceived.

The action could not be brought in the Admiralty jurisdiction

of the county court at all, and it could not be brought as an action in rem.

I think, therefore, that the whole action fails, that the parties had no right to propound any issue in such action for the decision of the court, that the decision of the court upon such issue was invalid, and that the action should have been dismissed for want of jurisdiction, and judgment should have been entered for the defendants and the interveners.

That is sufficient, in my opinion, to dispose of this appeal, which should be allowed and the judgment set aside.

The parties, however, on the hearing of the appeal, argued at length the question which was raised before the county court judge, namely, whether an action in rem would lie against a ship or other property belonging to a person who was a party to the cause of action, but in respect of which cause of action the ship or other property sought to be made liable was in no way involved.

I have read and agree with the judgments of the President and Scott L.J. on this point and it is not necessary for me to say anything further than that in my view at the present time an action in rem will not lie save as against the ship or other property which is the very "res" in respect of or out of which the cause of action arises.

I agree that this appeal should be allowed with costs here and below.

Leave to appeal.

Solicitors for the appellants: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the respondents: *Pettite, Kennedy, Morgan & Broad.*

E. C. M. T.

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Nov. 1, 7, 8;
Dec. 19.

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Shipping—Short delivery of cargo—Seaworthiness—Conflict of laws—Yugo-Slavian ship—Scandinavian receivers—English charterparty—Argentine shippers—Charterparty clauses incorporated in bills of lading—Negligence clause—Arbitration clause—Construction of contract—Intention of parties—Law of the flag—English law.

The plaintiffs, Danish and Norwegian merchants, to whom, as endorsees of the bills of lading, the property in part of a cargo of grain had passed, claimed in respect of short delivery from the defendants, the owners of the Yugo-Slavian steamship *N*.

By a charterparty entered into in London by an English registered company as agents for the defendants, and the London branch of a Paris firm as agents for the charterers, an Argentine company, the *N* was chartered to load the grain in the River Plate for delivery at Scandinavian ports. The charterers were the shippers. The charterparty was in English on the Chamber of Shipping River Plate ("Centrocon") form. The bills of lading, in an English form and in the English language, incorporated "all the terms, conditions and exceptions" of the charterparty "including the negligence clause." The charterparty contained the usual English arbitration clause.

The cargo was damaged by fire on board the *N*, due, as the plaintiffs alleged, to the ship being unseaworthy. The defendants, who counter-claimed for a general average contribution, in an amended defence pleaded that the law governing the bills of lading contract was Yugo-Slavian law, the law of the flag, under which it was alleged that, if they had exercised due diligence to keep the ship seaworthy, the exceptions in the charterparty would apply without the implied warranty of seaworthiness.

It was admitted that the proper law of the charterparty was English law. The question of the law applicable to the bills of lading was tried as a preliminary issue:—

Held, (*a*) (following *T. W. Thomas & Co.* v. *Portsea Steamship Co.* [1912] A. C. 1) that the arbitration clause, which would have been decisive as to the application of English law, was not incorporated into the bills of lading; but (*b*) that those clauses, which were incorporated, and particularly the exceptions clause, could not be isolated from their context and incorporated without any indication of the proper law of the contract from which they were taken; (*c*) that the inference was that sensible business men must have intended that the bills of lading should be read with the English interpretation attaching to the charterparty; and (*d*), that both on what should be presumed to be the intention of the parties and on the ground of business efficacy the proper law of the contract was English and not Yugo-Slavian law.

PRELIMINARY POINT OF LAW on an agreed statement of facts.

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The plaintiffs were "the owners of cargo lately laden on board the s.s. *Njegos*"; the defendants were the shipowners.

According to the statement of claim, by three bills of lading the defendants acknowledged the shipment in good order and condition by Sociedad Anonima Comercial de Exportacion é Importacion (Louis Dreyfus & Cia) at Rosario and Buenos Aires of various quantities of yellow maize and pollards, for carriage to a port as ordered and delivery in the like good order and condition to the shippers or their assigns. The plaintiffs were Norwegian and Danish merchants who were endorsees of the bills of lading and to whom the property in the goods represented therein passed by reason of the endorsement. At Buenos Aires a fire broke out in the port bunker of the *Njegos*, and in the course of the fire fighting operations the cargo was damaged by water, most of it had to be discharged into lighters and a quantity was short delivered. The plaintiffs alleged that the fire was due to overheating owing to insufficient ventilation, and that the vessel was unseaworthy and unfit for the reception of the cargo.

The defendants by their defence alleged that the bills of lading incorporated all the terms, conditions and exceptions, including the negligence clause, of a charterparty made in London between the defendants and the shippers (hereinafter referred to as the Sociedad). The charterparty provided by the exceptions clause (cl. 29) that "The steamer shall not be liable for loss or damage occasioned by . . . . perils of the sea . . . . fire from any cause occurring . . . . or any latent defects in . . . . appurtenances . . . . even when occasioned by the negligence, default or error of judgment of the . . . . master, mariners or other servants of the shipowners. . . . ." The defendants alleged that they had incurred expenditure and made sacrifices for the common safety of ship and cargo, and they counter-claimed for a contribution in general average, payable, under cl. 31 of the charterparty, according to York-Antwerp Rules, 1924.

Subsequently the defendants amended their defence and alleged that the law governing the contracts of affreightment was Yugo-Slavian law, under which, if, as they alleged, they

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had exercised due diligence to keep the ship in a seaworthy condition, there being no absolute warranty of seaworthiness, they would not be liable for any part of the alleged short delivery.

This question as to the proper law of the contract was set down for trial as a preliminary point of law on an agreed statement of facts, from which, in addition to the facts already stated, it appeared that the *Njegos* was owned by a company incorporated under the laws of Yugo-Slavia, with its head office at Zagreb and sailed under the Yugo-Slavian flag; that the charterparty—the Chamber of Shipping River Plate Charterparty ("Centrocon")—under which the *Njegos* was chartered, was made between Baburizza & Co., Ld., an English registered company, as agents for the shipowners, and the London branch of Louis Dreyfus & Co., whose head office was in Paris, as agents for the charterers, the Sociedad, of Buenos Aires; and that the grain was sold by the Sociedad to the plaintiffs on the terms of the London Corn Trade Association Contracts.

The charterparty, by cl. 39, provided for the arbitrament of all disputes arising out of the [charterparty] contract by two arbitrators carrying on business in London.

By cl. 10, freight not exceeding one-third was to be advanced by the charterers on signing bills of lading at current rate of exchange for approved commercial bills on London, and the balance in cash in London on delivery of the cargo, or, at charterers' option, at destination by approved bankers' and/or Louis Dreyfus & Co.'s cheque on London concurrent with discharge.

According to the bills of lading the grain shipped by the Sociedad thereunder was to be delivered to "Louis Dreyfus et Cie, or their assigns, they paying freight for the said goods in accordance with the charterparty dated London, 19 May, 1932. All the terms, conditions and exceptions of which charterparty, including the negligence clause, are incorporated herein."

Sir Robert Aske K.C. and *H. Atkins* for the plaintiffs. The

broad principle is that the law applicable depends on the intention of the parties: see Scrutton on Charterparties and Bills of Lading, 13th ed., pp. 19, 20. The law of the flag is applicable to contracts entered into during the voyage by the master, who has authority, for example, to sell the cargo if necessity arises, but there is no presumption in favour of the law of the flag in an ordinary contract of affreightment like the present. All the surrounding circumstances must be looked at. The charterparty, bills of lading and sale contracts were in English, on well-known forms; freight and demurrage were payable in English currency and in London; and all disputes arising out of the charterparty were to be decided by arbitration in London.

[*Willink K.C.* I admit that the proper law of the charterparty, in view of the arbitration clause, is English: *Hamlyn & Co.* v. *Talisker Distillery.* (1)]

The position then is, an English charterparty governed by English law, and English bills of lading issued under it, which, when issued are merely receipts and have no contractual effect: *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (2); *Leduc* v. *Ward.* (3) The charterparty, therefore, is the governing document, and no other law than that applicable to the charterparty can be imported into the case merely by the subsequent endorsement of the bills of lading to buyers of different nationalities.

It is pleaded in the defence that the bills of lading incorporate all the terms, conditions and exceptions, including the negligence clause, of the charterparty, and if the arbitration clause is also incorporated it is conclusive on the question that the proper law of the contract is English law: see *Maritime Insurance Co.* v. *Assecuranz-Union von* 1865 (4), following *Hamlyn & Co.* v. *Talisker Distillery.* (1) There is a distinction between cases in which there are merely such vague words as "freight and all other conditions as per charterparty" and a case like the present where the words in the bills of lading are that "all the terms, conditions and exceptions of the

(1) [1894] A. C. 202.
(2) (1886) 18 Q. B. D. 67.
(3) (1888) 20 Q. B. D. 475.
(4) (1935) 52 Ll. L. R. 16.

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charterparty are incorporated." In none of the cases in which it has been held that the arbitration clause in the charterparty is not incorporated have the incorporating words been as strong as this: e.g., in *T. W. Thomas & Co.* v. *Portsea Steamship Co.* (1) Lord Gorell was considering the words "freight . . . . with other conditions as per charterparty."

[*Willink K.C.* The practice in Chambers in the Commercial Court is to refuse applications to stay proceedings under bills of lading because of an arbitration clause in the charterparty.

Aske K.C. I accept that.]

Even if the arbitration clause is not deemed to be incorporated, other clauses very definitely English are incorporated—namely, the exceptions clause and the freight clause.

On the facts, this case is stronger in favour of English law than either *Aktieselskab August Freuchen* v. *Steen Hansen* (2) or *The Adriatic* (3), a case in which the parties were not concerned with the charterparty at all.

[THE PRESIDENT. In that case Langton J. laid stress on the argument of "convenience." That consideration is less prominent here.]

The argument of "uniformity" should prevail; all parties knew that they were contracting under standard English forms. Since *Lloyd* v. *Guibert* (4) there is no case to be found in the reports in which the law of the flag has been applied to a contract of affreightment except *The Express* (5), a decision of Sir Robert Phillimore which is inconsistent with another decision of his on almost identical facts in *The Wilhelm Schmidt.* (6) In *In re Missouri Steamship Co.* (7) Chitty J. thought that the law of the flag (which was British) applied, but the Court of Appeal expressed no view on this point, as they held that the contract itself showed that English law was applicable. The facts here—the bills of lading and charterparty on printed forms in common use, etc.—are very similar to those mentioned by Lord Esher in *The Industrie* (8), from

(1) [1912] A. C. 1.
(2) (1919) 1 Ll. L. R. 393.
(3) [1931] P. 241.
(4) (1865) L. R. 1 Q. B. 115.
(5) (1872) L. R. 3 A. & E. 597.
(6) (1871) 1 Asp. M. L. C. 82.
(7) (1889) 42 Ch. D. 321.
(8) [1894] P. 58.

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which it should be inferred that sensible business men intended English law to govern their contract. The law of the flag was not in the minds of the defendants even when the case came to be pleaded, for it is only by an amendment to the defence that the question of Yugo-Slavian law is raised.

[Reference was also made to *The St. Joseph* (1); *The Torni* (2); *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.* (3); *Fort Shipping Co.* v. *Pederson & Co.* (4); *Anselme Dewavrin Fils et Cie* v. *Wilsons and N. E. R. Shipping Co.* (5); *Evans* v. *James Webster & Bros., Ld.* (6)]

Willink K.C. and *C. T. Miller* for the defendants. The contracts between the plaintiffs, Danish and Norwegian buyers, and the defendants came into existence when, and not until, the bills of lading were endorsed; up to that time the bills of lading were mere receipts: see *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (7) and *Leduc* v. *Ward.* (8) It does not appear where the bills of lading were taken up, but none of them at any rate were taken up in England. No new law, as the plaintiffs contend, is being imported into the case, for the contracts are on the bill of lading and not on the charterparty, and when they came into existence they were governed by the law of the flag. That is the presumption, and it is for the plaintiffs to satisfy the Court that this was not the intention of the parties.

So far as the arbitration clause in the charterparty is concerned, the case is covered by *T. W. Thomas & Co.* v. *Portsea Steamship Co.* (9), which is conclusive on the point that this clause is not deemed to be incorporated.

[THE PRESIDENT. I need not trouble you on that point.]

Assuming then that the arbitration clause is not incorporated in the bills of lading, the plaintiffs' case is considerably weakened. Even if some of the clauses which are incorporated have an English flavour, the plaintiffs did not have notice of the law governing the charterparty. The heading is not a

(1) [1932] P. 119.
(2) [1932] P. 78.
(3) [1927] A. C. 604.
(4) (1924) 19 Ll. L. R. 26.
(5) (1931) 39 Ll. L. R. 289.
(6) (1928) 34 Com. Cas. 172, 178.
(7) 18 Q. B. D. 67.
(8) 20 Q. B. D. 475.
(9) [1912] A. C. 1.

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term or condition ; and the parts not brought to their notice might have been conclusive against the application of English law : the arbitration clause, for example, might have provided for arbitration at The Hague ; the doctrine of constructive notice does not apply : see *Manchester Trust* v. *Furness* (1), where Lindley L.J. said that the effect of the reference to the charterparty was to incorporate so much of its terms as related to payment of freight and other conditions to be performed on the delivery of the cargo, and that there was " no authority for incorporating more than that " : see also *Greer* v. *Downs Supply Co.* (2) The buyers, small grain merchants, had to take up the documents at once, and could not refuse to do so on the ground that they did not know what terms were incorporated, and their intention must be inferred at that time when they would not have seen the charterparty—and in practice would not concern themselves with it—and could have no knowledge of those parts of it which showed that it was subject to English law. None of the parties are English and there are only two English elements in the bill of lading contracts—namely, that the bills of lading are in the English form and language—the international language of maritime commerce—and that the shipowners had made another contract with the shippers which, though not known to the buyers, was subject to English law. The form of the sale notes is immaterial, for the buyer's action is not against the sellers. The shipowner may want different obligations under the bill of lading contract to those under the charterparty, e.g., seaworthiness. There is only an implied warranty of seaworthiness if the contract is governed by English law, and a foreign shipowner would certainly want the lesser liability—namely, the obligation of due diligence, if he could get it, as in this case he can under his own law, the law of the flag. All the authorities lay down as a general rule that the interpretation and effect of a contract of affreightment are governed by the law of the flag unless it can be shown that the parties intended some other law : see Dicey's Conflict of Laws, 5th ed., pp. 628, 666 et seq. ; Cheshire's Private

(1) [1895] 2 Q. B. 539, 545. (2) [1927] 2 K. B. 28.

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International Law, pp. 182 et seq.; and *Lloyd* v. *Guibert*. (1) There are only four reported cases where the law of the flag has been rejected in favour of English law as applicable to contracts of affreightment, and in all of them the countervailing considerations were much stronger than in the present case. *In re Missouri Steamship Co.* (2) is not really an exception, for there the lex loci contractus, which happened to be the law of the flag, was rejected in favour of English law. The other cases are *The Industrie* (3); *Aktieselskab August Freuchen* v. *Steen Hansen* (4); and *The Adriatic*. (5) In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (6), where there was an attempt to say that the law of the flag (Dutch law) prevailed, there was overwhelming evidence that the ships were really English. *The St. Joseph* (7) was not a question of the law of the flag, and is not in point. Of the four alternatives as to the proper law of the contract, neither the lex loci contractus nor the lex loci solutionis would be intended by the shipowners, for bill of lading contracts are made in many different ports in the course of the voyage, and the shipowners would not want to leave it to chance whether they were bound by Danish or Norwegian law. Similarly the plaintiffs had no reason for intending to contract under English law; they were buying from an Argentine shipper on a Yugo-Slavian ship. The ship was coming to Scandinavian ports and could be arrested for any breach of the contract of carriage, or she could be found in one of her home ports. It was a mere accident that the ship happened to come to England two years after the cause of action arose and that proceedings were instituted here. No part of the contract was to be performed in this country, and neither party can have intended English law to apply. As regards the fourth presumption stated by Cheshire—that law which best gives efficacy to the contract—there is no question that under the law of the flag the contract is not equally effective, and that law should be preferred.

(1) L. R. 1 Q. B. 115.
(2) 42 Ch. D. 321.
(3) [1894] P. 58.
(4) 1 Ll. L. R. 393.
(5) [1931] P. 241.
(6) (1883) 10 Q. B. D. 521, 534.
(7) [1932] P. 119.

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[Reference was also made to *Andreas Vergottis* v. *Robinson, David & Co.* (1); *Atlantic Shipping and Trading Co.* v. *Dreyfus Louis & Co.* (2); *British South Africa Co.* v. *De Beers Consolidated Mines* (3); and Scrutton on Charterparties and Bills of Lading, 13th ed., pp. 96 (art. 28), 248 n (x), and 502.]

Atkins in reply referred to *Glyn Mills & Co.* v. *East and West India Dock Co.* (4); *Burstall* v. *Grimsdale* (5); and *Biddell Bros.* v. *E. Clemens Horst Co.* (6)

Cur. adv. vult.

1935. Dec. 19. THE PRESIDENT (SIR BOYD MERRIMAN) read the following judgment: This is an argument of a point of law on an agreed statement of facts. The plaintiffs claim, as endorsees of the bills of lading, in respect of the short delivery of a certain quantity of maize and pollards, which were damaged as the result of a fire on board the defendants' vessel *Njegos*, in which the goods were shipped. The plaintiffs alleged that the fire was caused by the unseaworthiness of the vessel. The defendants pleaded that the bills of lading incorporated all the terms, conditions and exceptions, including the negligence clause, of the charterparty made between themselves and the shippers, and counterclaimed for a general average contribution. In their reply and defence to counterclaim the plaintiffs relied on the allegation of unseaworthiness in answer to the negligence clause. Up to this point, therefore, it was the defendants who were relying on the incorporation of the charterparty in the bills of lading, and the issue in effect was whether the damage was or was not caused by the unseaworthiness of the vessel. By an amendment of the defence, however, the defendants alleged that the law governing the bills of lading was Yugo-Slavian law. It was agreed between the parties that this issue should be tried as a preliminary point of law. The assumption is that if it is established that Yugo-Slavian law governs the contract of affreightment, the exceptions would apply without

(1) (1928) 31 Ll. L. R. 23.
(2) [1922] 2 A. C. 250.
(3) [1910] 1 Ch. 354.
(4) (1882) 7 App. Cas. 591, 596.
(5) (1906) 11 Com. Cas. 280.
(6) [1911] 1 K. B. 934.

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any implied warranty of seaworthiness, and that the defendants therefore would not be liable on the claim and would recover on the counterclaim. But it is not to be taken that it was proved or admitted that this would necessarily be the effect of Yugo-Slavian law.

By a convenient arrangement a statement of facts was agreed, and this statement must be taken to be incorporated in this judgment. It is only necessary for me to add, by way of summary, that the law of the flag of the ship was Yugo-Slavian; that the charterparty was made in England, in an English form and in the English language, between an English company, as agents for the Yugo-Slavian owners, and the English branch of a French company, as agents for Argentine shippers; that the bills of lading were in an English form and in the English language; and that the destinations of the goods were ports in Norway and Denmark respectively. It was also assumed, though it was not expressly stated, that the receivers of the goods were Norwegian or Danish nationals and that the shipping documents were to be taken up in those countries respectively. I was also informed that the bills of lading were in the common form adopted for this particular trade as long ago as 1914. As appears from the agreed statement, the charterparty was in the "Centrocon" form. This means, as the charterparty itself shows, the Chamber of Shipping River Plate Charterparty, 1914 (Homewards), in the form arranged and agreed with the Centro de Cereales of Buenos Ayres and adopted by the Documentary Council of the Baltic and White Sea Conference. Mr. Willink expressly admitted that the proper law of that contract was English. I may just add that I have not failed to observe that the form as given to me was as amended in the 1934 edition. The charterparty in this case was the 1932 edition.

This summary of the position shows that the choice of laws governing the contract of affreightment, in accordance with recognized principles, is almost as wide as it can be. The parties, however, confined themselves to two alternatives. Sir Robert Aske argued that the contract was governed by

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English law and Mr. Willink that it was governed by the law of the flag, that is to say, by Yugo-Slavian law. The point is an interesting one and was admirably argued on both sides.

Before dealing with the main argument I will dispose of a subsidiary point raised, not very hopefully, by Sir Robert Aske. The charterparty contains the usual English arbitration clause. A well known line of authorities lays down that this, taken by itself, may be regarded as decisive as to the application of English law to the contract: see *Hamlyn & Co.* v. *Talisker Distillery* (1) and *N.V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.* (2) He argued that this clause was incorporated, amongst others, in the bills of lading, with the result that English law would automatically apply to them also. I am of opinion that this point is unsound. The principle underlying the cases governing the incorporation of the terms of a charterparty in bills of lading, to some of which I shall have to refer later, seems to me to be inconsistent with the incorporation of the arbitration clause as such: see, for example, *T. W. Thomas & Co.* v. *Portsea Steamship Co.* (3) Both Sir Robert and Mr. Willink agreed, and their experience in these matters is unrivalled, that since the adoption of this form of bill of lading in 1914, attempts made in Chambers, under the bill of lading, to enforce the arbitration clause in the charterparty had uniformly failed, and that no one had been hardy enough to test the matter in Court. I stopped Mr. Willink in his argument upon this point, and I decide it against the plaintiffs.

This brings me, however, to what, stated in various forms in the course of an interesting argument, is really the kernel of the matter. Mr. Willink argued that it was the existence of the arbitration clause, alone, which made English law the proper law of the charterparty contract. If, therefore, it was decided that this clause was not incorporated in the bills of lading, it followed that such clauses of the charterparty as were incorporated in the bills of lading were to be written

(1) [1894] A. C. 202. (2) [1927] A. C. 604.
(3) [1912] A. C. 1.

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into them, without, as it were, any label or indication that they were to be interpreted by English law. The material words in the bills of lading are " to be delivered in the like good order and condition at the port of ' as ordered ' unto Louis Dreyfus & Cie or their assigns, they paying freight for the said goods in accordance with the charterparty dated London, 19th May, 1932. All the terms, conditions and exceptions of which charterparty, including the negligence clause, are incorporated herewith."

The real crux of the matter is whether cl. 29 of the charterparty, the material words of which are set out in the defence, which clause, as usual, is labelled marginally " Exceptions," is to be taken to be incorporated in the bills of lading verbatim, but entirely isolated from its context and with no indication of the proper law governing the contract from which it is taken, or whether it is to be taken to be incorporated as an extract from a contract to which English law is known to be applicable. Now, I do not agree with Mr. Willink that the arbitration clause is the sole test of the nationality of the charterparty. I think there are several indicia, all pointing the same way. For instance the English language and the English form of these clauses, which are admittedly incorporated and which include what Greer J. described in *Aktieselskab August Freuchen* v. *Steen Hansen* (1) as " many old friends " ; the fact that the freight is payable in sterling ; that the measurements of capacity and the guarantee of grain space are in English measures ; and not least important, the exceptions clause itself. Even so, however, Mr. Willink urges that the point remains the same. Only so much of the charterparty as is actually covered by the words I have quoted is to be incorporated into the bills of lading. The rest is to be ignored completely, and that which is incorporated carries with it no label of nationality derived from that which is to be ignored. It is not disputed, however, that the exceptions clause as a whole is included.

Now both counsel start with the principle that the question, what law governs the contract, must be decided by the

(1) 1 Ll. L. L. R. 393.

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intentions, actual or presumed, of the parties to the contract; see Dicey, Conflict of Laws, 5th ed., p. 628, and Cheshire, Private International Law, pp. 182 to 185. But, to quote Professor Dicey at p. 666: "Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of X and A, for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position of X and A if their attention had been directed to contingencies which escaped their notice." Mr. Willink relies on the well settled principle that as between shipowners and shippers the charterparty alone forms the contract, and the bills of lading are nothing but an acknowledgment of the shipment of the goods (*Rodocanachi, Sons & Co.* v. *Milburn Bros.* (1) per Lord Esher M.R.). But the contract in issue here, as he points out, is not the charterparty, but the contract between the shipowners and the ultimate receivers arising from the endorsement to them and the acceptance by them of the bills of lading in accordance with commercial usage. The bills of lading are the record of this contract: *Leduc* v. *Ward.* (2) But as a matter of commercial practice the receivers can have no means of knowing the terms even of the bills of lading until the moment when, under their obligation to their sellers, they take up the shipping documents. I gather from a document, which was put in as a typical contract of sale, that the receivers are in fact purchasers of part of a quantity of unascertained goods, not specified as being loaded in any particular ship, and that this sale contract was governed by English law. But even when they take up the shipping documents the receivers have no means in practice of acquainting themselves with such terms of the actual charterparty as must be taken to be incorporated by the very terms of the bills of lading by which they are bound. Although, therefore, the receivers bind themselves, unseen, by the terms of the bills of lading, provided always that these are in a form usual and proper for the trade (see *Burstall* v. *Grimsdale* (3));

(1) 18 Q. B. D. 67, 75. (2) 20 Q. B. D. 475, 479.
(3) 11 Com. Cas. 280, 290.

and although these terms include such terms, conditions and exceptions of the charterparty as are held to be incorporated in the bills of lading, there is no room, Mr. Willink argues, for any implication from these unseen terms as to the law by which the contract is to be governed. Now I entirely agree with Mr. Willink that the doctrine of constructive notice has no application to commercial documents (see *Manchester Trust* v. *Furness* (1)), but it seems to me that there is all the difference in the world between an attempt, such as was made in the case cited, to import from a charterparty into a bill of lading contract, by constructive notice, an abnormal provision which was not germane to the payment of freight or the other conditions to be performed on the delivery of the cargo, and importing, with those clauses of the charterparty which are undoubtedly incorporated, the proper law by which they are governed, when it must be recognized that the charterparty will necessarily have a proper law, and that this will probably appear, expressly or by inference, on its face. There is no suggestion in the judgments in the Court of Appeal in *Manchester Trust* v. *Furness* (1), that the incorporation by reference of whatever in the charterparty is germane to the receipt, carriage, or delivery of the cargo or the payment of the freight (to quote the words of Lord Atkinson in *Thomas* v. *Portsea Steamship Co. Ld.* (2), and see Lord Gorell), offends the rule against applying the doctrine of constructive notice to commercial transactions. Indeed Lord Lindley recognizes that this is the effect of the reference to a charterparty in a bill of lading.

In the absence of any expressed intention as to the law governing the contract, I am, as Professor Dicey points out, confronted with the difficult, but not unfamiliar, problem of deciding what that hypothetical person, the sensible business man, must be taken to intend when he is content to be bound by a contract in writing of which, by commercial usage, he is unable to see the actual terms beforehand, and with which, in practice, as Mr. Willink insisted, he does not really trouble himself in the least.

(1) [1895] 2 Q. B. 539, 545. (2) [1912] A. C. 1, 6, 8.

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Now the charterparty in this case, as I have already said, is in the standard form adopted by the trade in 1914. When, therefore, a sensible business man contracts on the terms of bills of lading in a form also adopted by the trade in the same year, it seems to me, even if I am not permitted to suspect that he would actually know that the charterparty therein referred to would probably be in the "Centrocon" form and would, therefore, be governed by English law, that it is pressing too far the well recognized principle that everything in the charterparty that is insensible must be rejected (see, for example, *Hogarth Shipping Co.* v. *Blyth, Greene, Jourdain & Co.* (1); *Fort Shipping Co.* v. *Pederson & Co.* (2); *Andreas Vergottis* v. *Robinson David & Co.* (3), to argue that the proper law of the charterparty is to be ignored when incorporating the material provisions in the bills of lading. I do not myself profess to understand how anyone contracting on the basis that the liabilities of the shipowner in connection with the receipt, carriage and delivery of the cargo are subject to the exceptions contained in a separate document, can know the terms on which he is contracting, unless and until he informs himself as to the system of law by which those exceptions are governed. It is not improbable that by this time traders in the River Plate Grain Trade to the Baltic know that in English law the warranty of seaworthiness is implicit, unless it is expressly included, and that some other systems of law differ in this respect. If, therefore, negotiations could take place between the shipowner and the receiver as to the incorporation in a bill of lading contract in English of certain specific clauses extracted from a charterparty in English, including an exceptions clause in the well-known English form, sensible business men would naturally wish to ascertain whether it was proposed that the contract should be read with the English implication or not. Otherwise the exceptions to the liabilities of the shipowner would not be clearly defined. But even if this

(1) [1907] 2 K. B. 534. (2) 19 Ll. L. L. R. 26.
(3) 31 Ll. L. L. R. 23.

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would be too much to expect with regard to a warranty which is read in to the exceptions by implication, one would suppose that, at any rate, they would wish to define by what system of law the expressed exception of negligence was to be measured. If nothing was said to the contrary I should assume that the intention was that the contract should be interpreted in light of the law by reference to which its clauses were drawn. What, then, is the proper inference when the exigencies of commerce preclude any antecedent negotiations, and in the absence of any expressed intention? Provided always that it is proper, according to mercantile usage in the circumstances of the case, to tender as one of the shipping documents a bill of lading incorporating by reference certain provisions of an English charterparty in the customary form, I think that the true inference is that the sensible business man must be assumed to intend that the contract shall be read with the English interpretation which admittedly attaches to the charterparty as such, though that interpretation is nowhere expressly stated, but it is to be inferred from several indications scattered throughout the charterparty, and notwithstanding that one of the indications—namely, the arbitration clause—is not included among the provisions incorporated in his contract.

On the basis, however, that the incorporated provisions of the charterparty afforded no guide as to the proper law of the contract Mr. Willink argued that there were only four possible alternatives as to the proper law—namely, the lex loci contractus, the lex loci solutionis, the law of the flag, or that law which best gives efficacy to the contract. Of these he maintained that in connection with the contract of affreightment it is settled that the law of the flag should be preferred: *Lloyd* v. *Guibert*. (1) Of these possibilities he asked me to reject the lex loci contractus and the lex loci solutionis. I agree with him, but I think that the reason why I was invited to reject these alternatives is worth noticing. The lex loci contractus with regard, for example, to some of the bills of lading would be Oslo, for it was there

(1) L. R. 1 Q. B. 115.

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that the shipping documents were to be taken up; but, as Mr. Willink pointed out, the place might have been anywhere in the Baltic, according as the bills of lading were endorsed to a national of one country or another. For the same reason the lex loci solutionis might be a port in one of several Baltic states. And, however willing the receiver might be to be bound by the law of his own state, there was, he said, no reason why the shipowner should be supposed to be ready to leave it to chance by what law he was to be bound. I will refer in a moment to the authorities relating to the law of the flag, but in passing I would point out that there seems to be no particular business reason why the parties to this contract should wish to be bound by the law of the flag. The shipowner has already discarded the law of the flag in connection with the charterparty, though it is his own law. The receiver has actually bound himself to take up the usual shipping documents by a contract which gave him no guidance whatever as to what the law of the flag might be expected to be. But Mr. Willink argued that there were only four reported cases in which the law of the flag had been ignored in connection with a contract of affreightment. They are *Aktieselskab August Freuchen* v. *Steen Hansen* (1) where Greer J. preferred the English law of the charterparty for the sake of uniformity; *The Adriatic* (2), in which Langton J., while not wholly convinced by the argument of uniformity, rejected the law of the flag on the ground that none of the parties was in the least concerned with the nationality of the ship; *In re Missouri Steamship Co.* (3) where the lex loci contractus, which incidentally was the law of the flag, was rejected in favour of English law on the ground that the contract of affreightment was in the English form and contained an exceptions clause, valid in English law but invalid in the United States of America, where the contract was made (*cf. Hamlyn & Co.* v. *Talisker Distillery* (4)); and finally *The Industrie* (5), where the Court of Appeal laid special stress on the English form of the charterparty. Lord

(1) 1 Ll. L. L. R. 393.
(2) [1931] P. 241.
(3) 42 Ch. D. 321.
(4) [1894] A. C. 202.
(5) [1894] P. 58, 76.

Esher's judgment in this last case seems to me to be particularly valuable as showing what are the real limits of the presumption in favour of the law of the flag in connection with a contract of affreightment. It seems quite plain that, in connection with such contracts as the master may be driven to make by necessity in the course of the voyage, the law of the flag should prevail, for it is that law which governs his relations with his owners; but that, as is pointed out by Lord Esher, is by no means inconsistent with the proper law of the contract of affreightment being a different law. In my opinion all these cases show very clearly that, as regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies. I can well imagine that if the parties in this case had been in a position to form an actual intention as to the law to govern their contract, the sensible shipowner would almost inevitably have stipulated that his rights and obligations in connection with the receipt, carriage and delivery of the cargo or the payment of the freight, should be the same in the two contracts formed, respectively, by the charterparty itself and by the bills of lading incorporating the relevant clauses of the charterparty. Nor in the circumstances of this case can I see any valid reason which would have induced the endorsees of the bills of lading to dissent from that proposal. Both on what, I think, should be presumed to be the intention of the parties, and on the ground of business efficacy, I am prepared to hold that the law of the Kingdom of Yugo Slavia is not the law governing this contract. I am not expressly invited to say what the proper law is; but in case it may be of assistance to the parties if I express my opinion, and I have not already made it plain what that opinion is, I say that I think the proper law of the contract is English law. The plaintiffs will have the costs.

Solicitors for the plaintiffs: *Waltons & Co.*

Solicitors for the defendants: *Richards, Butler, Stokes & Woodham Smith.*

E. C. M. T.

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Nov. 29;
Dec. 19.

PAPADOPOULOS *v.* PAPADOPOULOS.

Husband and wife—Desertion—Separation by consent—Illegal agreement to treat marriage as invalid—Assertion by wife of her rights—Commencement of desertion—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 *to* 1925 (58 & 59 *Vict., c.* 39) (15 & 16 *Geo.* 5, *c.* 51).

The parties were married in England in 1912. In 1913 the husband left the wife and they formally separated in 1914 by consent under an agreement which at the time both believed to be valid, the wife receiving a sum of money in full satisfaction of all claims on the husband. Thereafter there was no change in the marital relations of the parties inter se and they remained apart and the husband later went through a form of marriage with another woman. The agreement was based upon the mistake of law that the marriage had been invalid by reason of it not complying with the law of the foreign domicil of the husband, and in 1929, in proceedings in which an order for maintenance of the wife made by a Court of Summary Jurisdiction was upheld by a Divisional Court, the agreement was held to be illegal. In 1934 the wife, relying on this decision and on the footing of her resulting right to cohabitation, sued the husband, who had returned to England, for judicial separation on the ground of desertion.

In discussing the definition of desertion in *Fitzgerald* v. *Fitzgerald* (1869) L. R. 1 P. & M. 694, 698, and similar cases and with reference to the necessary cessation of an existing state of cohabitation to constitute desertion, the Court doubted whether time had ever ceased to run for the purpose of two years' desertion from 1913 onwards owing to the illegality of the agreement made in 1914, but:—

Held, that the wife, having re-asserted her rights in 1929, the husband had now been guilty of desertion for not less than two years during the period since 1913.

Wife's Petition for Judicial Separation on the ground of desertion.

The parties, Styliamos George Papadopoulos and Annie Eugenie Lucie Papadopoulos were married at a Register Office in London in 1912. The husband was a Cypriot domiciled here at the time of the marriage and the wife a Frenchwoman. The husband left the wife in London in 1913 and returned to Cyprus. The wife followed him, and in 1914 sued him in the District Court of Nicosia in Cyprus for a declaration of the validity of their marriage and maintenance. The suit was compromised by agreement and both parties consented to an

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order of the Court declaring the marriage null and void, and the wife received 380*l.* in settlement of all claims, returned to France and did not see the husband again for 15 years. In 1929, the husband being then in England, the wife on a summons obtained in a Court of Summary Jurisdiction a maintenance order against the husband on the ground of his desertion under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. An appeal of the husband to the Divisional Court from this order on the ground of the marriage having been declared null and void by the Cypriot Court was rejected, the Divisional Court holding that the Cypriot Court had no jurisdiction to annul the marriage and that the agreement arrived at in 1914 was unlawful. The proceedings in the case up to this point will be found reported in the Law Reports ([1930], P. 55). After the decision of the Divisional Court the husband returned to Cyprus with the intention, as now found by the Court, of evading the demands of the wife for maintenance under the order of the Court of Summary Jurisdiction. The wife followed the husband to Cyprus and took steps to enforce the order for maintenance. In 1934 the husband having returned to England and having set up in practice here as a medical man, the wife instituted the present proceedings alleging that both were domiciled here. There had been no resumption of cohabitation by the parties since the date of the previous proceedings, and the husband had since gone through a ceremony of marriage with another woman by whom he had children. The wife alleged desertion in or about July 1913. The husband denied desertion and pleaded the agreement to separate in May, 1914. The wife replied that the alleged agreement to separate was obtained by the fraud of the husband in verbally representing that the marriage was a nullity and further that the alleged agreement had been adjudicated upon by the Court at Nicosia and subsequently in succession by a Metropolitan Police Magistrate and a Divisional Court of this Division on Appeal and had been declared null and void and could not be relied upon, that the question of validity was res judicata and that the husband was estopped from raising the same.

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The result of the evidence given is stated in the judgment.

Maurice Healy K.C. and *H. J. Fuller* for the petitioner. On the facts there was desertion since the beginning of the separation or at all events since May, 1914, when the parties entered into an incompetent contract to treat the marriage as a nullity.

Noel Middleton for the respondent. On the facts and the pleadings, whether or not the separation initially amounted to desertion, two years' desertion had not run previous to the proceedings in Cyprus, and as from the date of the proceedings in Cyprus there could be no desertion, because at that date there was an agreement to treat the marriage as null and void as has already been found. (1) A misrepresentation of the law does not amount to fraud. No desertion existed as from the date of the proceedings in Cyprus because within two years of the original parting of the spouses there was an animus on both sides to separate whether the formal agreement was valid or not. The case is on all fours with that suggested by Cockburn C.J. in *Ward* v. *Ward*. (2) It is a cardinal principle that no spouse can desert "who does not actively and wilfully bring to an end an existing state of cohabitation . . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed": *Fitzgerald* v. *Fitzgerald*. (3) On May 19, 1914, both spouses had the animus to repudiate the marriage. *De Laubenque* v. *De Laubenque* (4) is distinguishable. In that case desertion was found in the absence of a previous cohabitation but the wife who complained of desertion had been willing to cohabit; there was no refusal on her part. Here both parties had desired separation.

At the date of the separation there was a compact to treat the marriage as a nullity and nothing short of a decree of restitution of conjugal rights can now restore the marriage

(1) [1930] P. 55, 66.
(2) (1858) 1 Sw. & Tr. 185, 186.
(3) L. R. 1 P. & M. 694, 698.
(4) [1899] P. 42.

that both have repudiated. She may have a right to maintenance but not to judicial separation. In *Walter* v. *Walter* (1) an agreement to live apart was collected by the Court from a correspondence between the parties and held to be an answer to the suit of the wife for restitution of conjugal rights. What took place in this case in 1914 gives rise to a similar inference. In *Pulford* v. *Pulford* (2) there was a separation for 38 years and the husband was at the close of the period found guilty of desertion; but the case is distinguishable, as the wife was in an asylum by reason of unsoundness of mind and therefore was incapable of consenting.

Maurice Healy K.C. in reply. We rely upon *De Laubenque* v. *De Laubenque*. (3) The petitioner has never bargained away her rights. *Huxtable* v. *Huxtable* (4) shows that desertion may arise even where there is no existing cohabitation if one party so wills and both must have desired separation to negative desertion. The erroneous view of the law presented to the wife in 1914 deprived the case of being one of mutual consent. At all events there has been desertion since the last hearing in this Court.

Cur. adv. vult.

1935. Dec. 19. THE PRESIDENT (SIR BOYD MERRIMAN). This is a wife's petition for a judicial separation on the ground of desertion for two years and upwards. The matrimonial history of the parties has already been the subject of investigation by a Divisional Court of this Division, on an appeal from a Metropolitan Police Magistrate. (5) It was then decided that notwithstanding an Order made by consent in the District of Nicosia, in Cyprus, on May 19, 1914, declaring the marriage void, the spouses were husband and wife in English law, and that the Magistrate had rightly made an order for maintenance at the rate of forty shillings a week on the basis that the husband had wilfully neglected to maintain his wife. The facts stated in that report must be taken as incorporated in this judgment, and it is, therefore, unnecessary to restate them

(1) [1921] P. 302.
(2) [1923] P. 18.
(3) [1899] P. 42.
(4) (1899) 68 L. J. P. 83.
(5) [1930] P. 55.

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at length. Issues are raised by the pleadings, however, which were not dealt with on the former occasion and I will state my findings of facts in regard to these. Both parties have given evidence before me. The events of which they were speaking occurred over twenty years ago ; the wife had a very imperfect mastery of the English language and gave her evidence partly in English, and partly in French, through an interpreter. They were in violent conflict as to the circumstances of their marriage at an English Register Office on November 27, 1912, and as to the facts leading up to the decree of the Court in Cyprus in 1914. The husband asserted that the ceremony at the Register Office had never been intended by either party to be a marriage at all, but was merely a form, known by both parties to be invalid and ineffectual, in order to provide the wife, from whom he was about to part for ever by mutual consent, with some documentary evidence to enable her to satisfy her mother that she had not been leading an immoral life. He asserted consequently that her following him to Cyprus, in order to assert her rights as a wife in that country, was an act of blackmail. He pleaded the agreement of May 19, 1914, being the Consent Order of the District Court of Nicosia of that date, as a valid and subsisting agreement for separation. The wife, on the other hand, while admitting that she had made inquiries at the French Consulate with regard to the essentials for a marriage in Cyprus, asserted that the English marriage was intended to be a reality, and that, so far from there being any agreement to part, it was always understood that she should follow her husband to Cyprus as soon as he was in a position to receive her there. She pleaded, and asserted in the witness-box, that her consent to the Order in the District Court of Nicosia was obtained from her by fraud.

For the reasons I have given it is impossible to be certain that one can rely implicitly on the details of the evidence relating to matters which happened so long ago ; but I feel able to come to a definite conclusion as to the truth of the matter, speaking generally, with regard to these issues. I find that both spouses intended on November 27, 1912, to go

through a ceremony of marriage, which they knew was binding in England; and I reject the suggestion that the whole proceeding was intended to be a mere sham. I find that when the husband returned to Cyprus he already intended to desert his wife, and that the letters written by him and on his behalf were intended to prevent her from rejoining him. And I am satisfied that he took advantage of what is stated to be the Cypriot law to give effect to his purpose of leaving his wife. It is clear, however, that at the time when the Nicosian Court made the order desertion had not lasted for the statutory period of two years. With regard to the Consent Order, I find that both spouses, acting on the assumption that the husband was then domiciled in Cyprus, believed that the proceedings in the District Court of Nicosia were valid. I cannot accept the contention that the wife, advised as she was by the King's Advocate in Cyprus, was a victim of fraudulent misrepresentation. It is worth noting that when the validity of these proceedings was the subject of earlier litigation there is no trace in the report of this contention, and I think it is too late to raise it now. Nor is it possible, as I was at one time inclined to think, to consider her consent to that Order as having been based on a mistake of fact, common to both parties. It is stated in the report of the case in the Divisional Court (1) that it was common ground that the marriage was invalid according to the law of the Cypriot domicile of the husband, for the reasons given. The Cypriot law on the subject would, of course, be a question of fact in an English Court, but as to this there was no mutual mistake. The mistake was with regard to the effect of the Cypriot law on the English marriage, but this was a mistake in regard to the law of England. The result, therefore, in my opinion, is that in 1914 the spouses parted as the result of an agreement, which, however unwilling the wife was to enter into it, both believed was validated by the Order of the District Court; but it has already been decided that this agreement was illegal as well as immoral, and cannot be set up by either of the parties in an English Court. (1)

(1) [1930] P. 55, 57, 67.

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I also find that from 1929, when she became aware of her rights in English law, the wife became determined to assert her position as a wife. Indeed it is impossible to hold otherwise as the proceedings which she took successfully in the English Courts were the exact negation of the Consent Order in the Nicosian Court. But I find that as soon as the order in her favour had been upheld in the Divisional Court, the husband returned to Cyprus with the definite object, amongst others, of avoiding the demands of the wife. Indeed she was obliged to pursue him to Cyprus to obtain the fruits of her order. Effect was given by the Cypriot Court, though I was not informed of the precise details, to the maintenance order, and I understand that the husband has in fact paid regularly under the order. But it was not until 1934, when the husband returned to this country, and set up in practice here, that the wife was in a position to begin proceedings for judicial separation. Her petition was filed on October 27, 1934. I need only add that there has been no resumption of cohabitation in any sense of the word since the former proceedings. On the contrary, the husband in May, 1919, " married " another woman in accordance with Cypriot law. He has had a family by her, he is still living with her, and intends to continue to do so. On these facts counsel for the husband submitted, first, that there was no desertion at all. I have already found against him as regards the period before the Order in the Court of Nicosia. But on this assumption he submitted, in the alternative, that I could not, as a matter of law, find that there had been desertion for two years, seeing that nothing like that period had elapsed before that Order and the subsequent separation of the spouses. He founded his argument on the well-known passage in the judgment of Lord Penzance in *Fitzgerald* v. *Fitzgerald*. (1) He laid particular stress on the two sentences which read as follows : " No one can ' desert ' who does not actively and wilfully bring to an end an existing state of cohabitation . . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both,

(1) L. R. 1 P. & M. 694, 698.

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'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed." He argued that the only remedy of the wife lay in a suit for the restitution of conjugal rights, though he also maintained that the husband would have a complete answer to such a suit. Now the passage in Lord Penzance's judgment and the corresponding decision in *Reg.* v. *Leresche* (1) have many times been discussed and considered. In both cases the point was that cohabitation had ceased with the full consent of the wife. In *Reg.* v. *Leresche* (1) there was a separation deed. In *Fitzgerald* v. *Fitzgerald* (2) the wife was deliberately refusing to live with the husband, under what proved to be a mistaken assertion that he was living in adultery with another woman. It has been pointed out that the passage referred to in Lord Penzance's judgment while completely accurate in the circumstances of that case, cannot be regarded as an exhaustive test of the meaning of desertion in all circumstances (see for example *Bradshaw* v. *Bradshaw* (3); *Pulford* v. *Pulford* (4); and *Huxtable* v. *Huxtable* (5)). I have considered a great many decisions on this point. It is admitted that none of them is exactly in point; indeed the circumstances are wholly exceptional. I think that the case most in point is the case of *Pulford* v. *Pulford.* (4) It is true that in that case the physical separation of the spouses began with the wife's removal to an asylum, and, therefore, was not consensual on her part; but she had been finally discharged from the asylum twenty years before the proceedings which were the subject of an appeal to the Divisional Court; and for the last seventeen of these years there had been no communication of any sort between the spouses. Meanwhile during her detention in the asylum the husband had commenced, and continued, an adulterous association with another woman. In these circumstances the wife, in 1922, took out, first, a summons for neglect to maintain, which, as at that time it was necessary to prove, had caused her to live apart from

(1) [1891] 2 Q. B. 418.
(2) L. R. 1 P. & M. 694, 698.
(3) [1897] P. 24, 26.
(4) [1923] P. 18, 20.
(5) 68 L. J. (P.) 83.

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him. No order was made upon this summons; but it was succeeded immediately by a summons for desertion, on which the justices found the husband guilty, as from the date of the former hearing. Their decision was upheld by the Divisional Court, Lord Merrivale (1) holding that the effect of the husband's conduct, and of his adultery, was that the wife might complain of desertion during the whole period, because there had been a complete renunciation by him of every conjugal duty. In this case I doubt whether the husband's original desertion has ever been interrupted, having regard to the fact that the separation during the period between 1914 and 1929 was due to an agreement which has been held to be invalid and illegal according to English law. However that may be, the wife re-asserted her rights in 1929. The husband has shown in the plainest possible way, and has asserted in the witness box that except in so far as he is obliged to comply with the maintenance order, he does not recognize the wife's existence, and has wholly thrown in his lot with the woman with whom he went through the marriage ceremony in Cyprus in 1919. In these circumstances I hold that, taking the whole period from 1913 to the date of the petition the husband has deserted the wife without cause for not less than two years.

I only wish to add one thing. It is to be observed that when this case was dealt with in the Divisional Court both Lord Merrivale and Hill J. laid stress upon the point that there was no appeal as to the amount of the order and that the Magistrate had no jurisdiction in that connection to inquire into the conduct of the parties. Hill J. anticipated the position which will arise upon this decision, when at the end of his judgment he said that the Court would be free to consider the conduct of the parties, the fact that in 1914 the husband had paid the wife 380*l.*, and that from then until 1929 they had lived apart without any claim by the wife, and so forth. In the event of an alimony petition in this case the Registrar would no doubt take into account the fact that the circumstances of this case are wholly exceptional; and

(1) [1923] P. 18, 22.

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I think that, as I have had the parties before me, it is desirable, in the event of either party challenging the Registrar's decision in the matter, that any appeal should be reserved to myself.

There will be a decree of judicial separation with costs.

Solicitors for the petitioner: *Barry O'Brien & Co.*

Solicitors for the respondent: *Kenneth Brown, Baker, Baker.*

R. M. M.

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Jan. 15.

Divorce—Practice—Trial by Judge alone—Re-hearing—Error of the Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 55 *—Matrimonial Causes Act,* 1860 (23 & 24 *Vict. c.* 144), *s.* 2— *Supreme Court of Judicature Act,* 1881 (44 & 45 *Vict. c.* 68), *s.* 9 *—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 91, 93— *Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 30, 226, *Sch.* 6—*Matrimonial Causes Rules* (1924), *rr.* 46, 97—*Rules of Supreme Court, Order* XXXVI., *r.* 33.

By the Matrimonial Causes Rules, 1924, r. 46, it is directed that an application for the re-hearing of a cause heard by a judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court.

A respondent, against whom a decree nisi had been pronounced for the dissolution of her marriage on the ground of her adultery, after trial by a judge alone, moved before a Divisional Court to set aside the decree and to have the case re-heard on the alleged ground that she had not been served with the petition. The question arising under r. 46 whether the application should be made to the Divisional Court on the general terms of the rule as to re-hearing or to the Court of Appeal as coming within the exception reserved by the rule of an "error of the Court at the hearing" was argued by the direction of the Court. On a general review of the practice as to re-hearing from the commencement of the Matrimonial Jurisdiction of the Court:—

Held, without expressly defining error of the Court and by analogous reference to the County Courts Act, 1888, s. 91, and to Rules of the Supreme Court, Order XXXVI., r. 33, that the application was not within the exception as to "error of the Court" and was therefore properly entertained by the Divisional Court.

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APPLICATION for the re-hearing of a petition for dissolution of marriage.

The petition of Harold Edward Manners was dated January 16, 1935, and prayed for the dissolution of his marriage with Florence Cecilia Dorothy Manners on the ground of her alleged adultery with William Fortescue. There were three children of the marriage. On June 26, 1935, the petition came on for hearing before the President, Sir Boyd Merriman. There was evidence of a confession of the wife and of the co-respondent having been found at the house where the wife lived, and the co-respondent gave evidence of his own adultery, after being duly cautioned. A decree nisi was pronounced on June 26, 1935, and custody of the children given to the petitioner. On October 11, 1935, the respondent gave Notice of Motion to set aside the decree nisi and the order for custody and for a re-hearing on the grounds that the respondent was never served with the petition and had no notice or knowledge of the proceedings until she was served with the order giving custody of the children to the petitioner and finally that she denied adultery and desired to defend proceedings for divorce.

The usual affidavits of service had been filed. A process-server deposed that he served the respondent outside a London police court on February 5, 1935, that the respondent was identified to him by the petitioner at the time and admitted her identity in answer to his question. On December 30, 1935, the respondent made an affidavit in which (inter alia) she denied having been served with the petition. She admitted that she had been accosted at the police court on the occasion deposed to by the process-server and by a man who asked whether she was the respondent. She swore that she was then summoned to attend to other business (being in fact an application to the Court with reference to the children of the marriage), and that later when that business was completed she could not see the man. She did not see or receive any papers and denied that she had committed adultery. On January 14, 1936, the process-server made a further affidavit deposing that the respondent was pointed

out to him by the petitioner on the occasion of service, that after asking her whether she was "Mrs. Manners," he handed her the petition. He said that she dropped it, that he followed her with it and inside the court pushed the petition into her coat.

On the present application for a re-hearing coming on before the Divisional Court, the Court desired argument on the interpretation of r. 46 of the Matrimonial Causes Rules, 1924. (1)

F. K. Glazebrook for the wife. The applicant cannot under the material rule 46 apply to the Court of Appeal in the absence of error of the Court. The error (if any) at the trial was that the applicant was not properly served, and this was a matter not known to the Court at the time of the hearing. Apart from error of the Court application for a re-hearing of a case tried without a jury must under the rule be made to a Divisional Court. Under the Rules and Regulations of 1865, r. 62, an application for a new trial or for a re-hearing was made to the Judge Ordinary, subject to the right of appeal to the full Court under the Matrimonial Causes Act, 1857 (21 & 22 Vict. c. 85), s. 55. By the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 2, appeals from the Judge Ordinary granting or refusing a new trial were to go to the full Court. By the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9, appeals under the Divorce Act, 1857, or any other Act to the full Court are transferred to the Court of Appeal. Rule 62, originally dated in 1865, continued in force in its original form till 1885, when it was amended so as to direct that an application for a new trial

(1) "Rule 46: RE-HEARING. An application for the re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the Probate Divorce and Admiralty Division, and shall be by notice of motion, stating the grounds of the application, filed in the Registry and served within six weeks after Judgment, and such notice shall be a fourteen days' notice, and may be amended at any time by leave of the Judge. Application for re-hearing in any case not hereinbefore provided for must be made by appeal to the Court of Appeal."

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of the issues of fact tried by a jury or for a re-hearing should alike thereafter be made to a Divisional Court. This practice continued till 1890, when the Judicature Act of that year (53 & 54 Vict. c. 44), s. 1, directed that an application for a new trial, after trial by a jury, should be to the Court of Appeal and not to a Divisional Court. In *Smith* v. *Smith* (*Nowers Intervening*) (1) the Act of 1890 was held not to apply to a re-hearing after trial without a jury. See also *Garnett* v. *Garnett and Calderon* (2), where a re-hearing on the ground of misdirection was granted by the Divisional Court. Finally by the Judicature (Consolidation) Act, 1925, s. 226, Sch. 6, the Act of 1890 was repealed and s. 30 of the more recent Act, by directing applications for a new trial after trial by a jury to be made to the Court of Appeal, is so expressed as to be consistent with the decision in *Smith* v. *Smith*. (1) In the meantime r. 46 of the Matrimonial Causes Rules, 1924, has limited the jurisdiction of the Divisional Court to cases where no error of the Court is alleged. No error is shown on the part of the trial judge; the circumstances of the trial rather point to the desirability of his presence as a member of the appellate tribunal. Order XXXVI., Rules of the Supreme Court, r. 33, as to the practice in the High Court generally as to setting aside a judgment obtained by default is analogous. The county courts have wide powers as to dealing with their own judgments under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93. Their powers have to be exercised judicially, but the setting aside of a judgment by default in proceedings of which one party has not received notice is clearly within the limits of judicial discretion: *Brown* v. *Dean* (3); *Astor* v. *Barrett*. (4)

A. B. McNulty for the husband submitted to the jurisdiction of the Divisional Court as appearing on the construction of the statutes and rules cited and did not contest an order for re-hearing.

THE PRESIDENT (SIR BOYD MERRIMAN). This is an application under r. 46 of the Matrimonial Causes Rules, 1924, for

(1) [1897] P. 293.
(2) (1919) 35 Times L. R. 521.
(3) [1910] A. C. 373.
(4) [1920] 3 K. B. 633.

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the re-hearing of a divorce cause heard by myself alone, and the application is made to this Divisional Court under that rule on the suggestion that no error of myself at the hearing is alleged.

As we are informed that this is the first time that this Court has been called upon to give a decision as to the limits of this rule, which, as a matter of history, came into existence in 1924 in this form, and as I was the trial judge, and am particularly anxious to make it clear that in no circumstances whatever would I contemplate hearing an appeal where my own decision was in any real sense of the word challenged, I think it would be as well that I explained shortly what is the exact point of this case.

The husband sued for divorce on the ground of adultery with a co-respondent named Fortescue. In order that the husband may be entitled to have a decree nisi of divorce he must prove, first of all, the marriage; secondly that he is a domiciled Englishman; and thirdly, the matrimonial offence alleged—in this case adultery with Fortescue—and fourthly that he has served the petition upon his wife.

So far as the issue of adultery (the first two issues are immaterial for the present purpose) is concerned, apart from some evidence of the husband of a confession by the wife and of his having caught the co-respondent at the house at which the wife was living, the actual evidence of adultery before me was provided by the co-respondent himself, who came into the witness-box and swore that he had committed adultery with the wife. There remains, therefore, the question of service upon the wife. As regards that, there were affidavits of service, in accordance with the practice of this Court, by two separate persons who had served respectively the wife and the co-respondent, and though strictly it was unnecessary, as the affidavits were self-contained and sufficient, the husband in fact gave (it is true in answer to a leading question) evidence before the Court that he had been present on the occasion in each case when the parties respectively were served, as the process-server had said. And in addition to that, as I have already said, the Court had before it in person the co-respondent

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with regard to whom one of these affidavits of service related. In those circumstances I think that it is not out of flattery merely that counsel on both sides say that the fact that the Court accepted this evidence of service does not bring the case within the words " where error of the Court at the hearing is alleged." But there still remains the question, whether, notwithstanding counsel's admission, this is a case which comes within the rule.

I do not want to review the whole history of this matter, which is, I think, reasonably clear, though it takes a certain amount of tracing out. It is sufficient to say that in this Division after the alteration of r. 62 in 1885 an application for a new trial on an issue of fact tried by a jury, or for the re-hearing of the cause under the old r. 62, were alike made to a Divisional Court of this Division up to 1890. Then by the Judicature Act of 1890, s. 1, as interpreted in the case of *Smith* v. *Smith* (1), an application for a new trial to set aside a verdict, finding, or judgment, where there has been trial by jury, went to the Court of Appeal, and it was held in *Smith* v. *Smith* (1) that the result was that an appeal from a judge alone still went to the Divisional Court of this Division. Next in the course of the revision of the Statute Law in the series of Acts which were passed in 1925, the corresponding provision of the rules of Court, r. 46 of the Matrimonial Causes Rules, 1924, was recast in the words in which it now stands : " An application for the re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division " and the procedure is set out. The result of that, I am satisfied, is that every sort of appeal from a judge of this Division in divorce, whether he is sitting alone, or whether he is sitting with a jury, except an application for re-hearing where no error of the Court is alleged, goes to the Court of Appeal under the rules set out in the White Book applicable to all Divisions of the High Court indiscriminately. This application for a re-hearing is, therefore, the only remaining exception from the general jurisdiction of the Court of Appeal

(1) [1897] P. 293.

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in all appeals from a High Court judge, and, therefore, it is important, and it is vital, that we should not assume a jurisdiction which properly belongs to the Court of Appeal. The question then is whether in the sort of circumstances I have mentioned, which are the circumstances of this case, where a woman has been convicted of adultery though she says that she has not been served with the petition, that comes within the exception in the rule of cases in which error of the Court is alleged.

There is no precedent to guide us as to what is meant by the words " Where no error of the Court at the hearing is alleged." No such phrasing has ever been used apparently in any other rule of Court applicable to any of the Divisions of the High Court or their predecessors, and even now I think that it would be most inadvisable to attempt to lay down any exhaustive definition of what those words mean. On the other hand I think it is desirable to make it plain why I think that the present case does not come within the words of the exception. We suggested yesterday, when we directed the point should be argued, that some assistance, at any rate, could be derived from a consideration of the somewhat analogous provisions relating to county courts, and our attention has been directed to the relevant sections. I propose to quote the sections of the Act of 1888 because they were sections in force at the time when this rule was passed, although there is no material difference between them and the corresponding sections of the County Courts Act, 1934. There are two relevant provisions in regard to a county court judge's authority in matters akin to this. Sect. 91 of the Act of 1888 deals with a trial in the absence of the defendant with this proviso : " that the judge in any such case, at the same or any subsequent Court, may set aside any judgment or order so given or made in the absence of the defendant, and the execution thereupon, and may grant a new trial or hearing, upon such terms, if any, as to payment of costs, giving security or such other terms as he may think just, on sufficient cause shown to him for that purpose." Now a corresponding power is vested in the King's Bench and Chancery Divisions of the

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High Court of Justice by R. S. C., Order XXXVI., r. 33, and nobody I think would dispute that a case merely of that sort would come well within r. 46; but the county court judge has by s. 93 of the Act of 1888 another power which has no counterpart in the High Court of Justice, except so far as this particular rule of this Division may be said to be to some extent equivalent. A county court judge by s. 93 has powers which are enacted in these words: "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties; but the Court shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given entitling either the plaintiff or defendant to judgment. The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings." Those words are of course as wide as well can be, and are obviously very much wider than the words in our r. 46, therefore, it follows, that the contents of r. 46 are something larger than the corresponding s. 91 of the County Courts Act, but considerably less than the provision in s. 93 of that Act. I think that some considerable guidance is got from the decisions on s. 93. I am not going to refer to them at length, but I wish to call attention to two cases. In *Brown* v. *Dean* (1) the House of Lords considered the limits of this very section of the Act of 1888, and after laying down that it was quite plain that this was not an arbitrary discretion but one which must be exercised judicially, Lord Loreburn L.C. expressly agreed with the judgment of Farwell L.J. in the Court of Appeal in the same case, in which Farwell L.J. pointed out that the county court judge disregarded all the rules which would govern a High Court judge in similar cases, and said (and Lord Loreburn adopts these words as his own words): "In the present case the county court judge has disregarded those principles, and has granted a new trial on affidavits which show at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which

(1) [1910] A. C. 373, 375.

show nothing in the nature of surprise, fraud or conspiracy, and which also state nothing to show that the information alleged could not with reasonable diligence have been obtained at the first trial. The real ground that influenced the learned judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter is serious for the defendant in consequence of his position. Neither of these grounds is in my opinion sufficient." It is to be observed that anything in the nature of surprise, fraud or conspiracy, anything which could not with reasonable diligence have been obtained at the first trial, on being subsequently discovered, would be regarded whether in the High Court or in the county court as the sort of case which would plainly come within s. 93. The only other case to which I wish to refer is one, part of which I quoted in the argument and to which counsel for the wife had referred, *Astor* v. *Barrett* (1) and the judgment of Atkin L.J., as he then was, where he said, testing the rival contentions as to the limits of s. 93 : " The matter may be tested in this way : Suppose there is admissible evidence on both sides and in addition to the admissible evidence the judge receives evidence which he ought not to have accepted ; if he is afterwards satisfied that he has made this mistake, it seems to me that he has ample jurisdiction to grant a new trial. Again if he has made a mistake as to the proper measure of damages, he could correct that by saying that he had misdirected himself, and grant a new trial if a new trial is necessary in order to ascertain the true damages. But if the correction of the mistake of law is such that the High Court would not grant a new trial but would reverse the judgment, then there is no power in the county court to grant a new trial." I need not read the rest of the passage, but I take the view, as I have already said, that our power under r. 46 is considerably less wide than that ; but at least I think it is wide enough to deal with this case in either of the two aspects in which it is presented to us. We have read the affidavits with regard to the non-service of this petition, and the wife swears categorically that she was never served, although she

(1) [1920] 3 K. B. 633, 641.

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remembers an incident at a time when she attended a police court matter between herself and her husband, a matrimonial matter, when a man came up to her and asked her some questions; that obviously corresponds with the occasion on which it is sworn that she was served. It may be one of two things, it may be either that advantage was taken of that occasion to go through the form of identifying her and yet not serving her in order to avoid her appearance, which I say at once, I regard as most unlikely, although I am not going to decide one way or the other about it; but I think that it is so fantastically improbable, having regard to the known circumstances of the case, and the fact that the process-server was, I gather, the son of the senior partner in the firm of solicitors, that it does not fairly merit consideration beyond stating that it is actually a possibility; or secondly it may be that as appears from looking at the corresponding evidence of the wife and the fresh evidence of the process-server that the wife, without knowing that her husband was petitioning against her (because he does not say that he told his wife that), received a piece of paper thrust upon her (which she may not even have appreciated was connected with some matter between her husband and herself) at the moment when she was about to go into Court on a matrimonial summons and she dropped it on the floor. That is common ground, or at any rate, the process-server says that it was so, and it was picked up and put into her hands, or put into her coat, as she was actually walking into Court. In other words, physically she was served, actually, she says, the thing never came to her notice. I am not going to decide here and now which of these possibilities is actually the truth. All that doubtless will be gone into on one side and the other when this case is fully heard out, but it is quite plain upon either view of the facts that this woman is entitled to be heard, seeing that she has stated categorically on affidavit that she has never committed adultery with this man, or with anybody else, and in those circumstances the truth of the matter about the form the service took will be investigated no doubt as a matter of credibility of the witnesses at the

next hearing; but that there must be a new trial—a re-hearing —I have no doubt at all. I think that the proper order to be made is for the wife to file her answer within ten days. I think that the co-respondent will have to be re-served, and there must be provision made for expediting the hearing.

LANGTON J. I agree, and since r. 46 is coming up for consideration apparently for the first time it is perhaps proper that I should add a word or two concerning my interpretation of the rule.

As my Lord has said, there is a valuable analogy to be obtained from the rules of the county court, and I, like him, am satisfied, that our powers under this rule are certainly not so extensive as the powers of the county court judges under their similar rule. To the county court judges there is clearly reserved a certain limited latitude in considering their own errors. I am quite satisfied that so far as we are concerned we have no power either to meditate mournfully upon our own errors, or perhaps more pleasurably upon each other's errors. The matter is put beyond doubt by the wording of the rule: "An application" says the rule, "for the re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged, etc." Absence of alleged error is a condition precedent to what is reserved for the consideration of a Divisional Court. Therefore it has to be considered whether the present case is one which falls within that rule. Counsel on both sides are agreed that it does fall within the rule, and I am of the same opinion. I think that in the nature of things the cases which can fall within the rule must be comparatively few. But the rule must contemplate, I think, something more than the bare cases that are covered by the High Court Rule, Order XXXVI., r. 33, that is cases in which judgment has been given by default. It would obviously have been unnecessary to preserve or enact in the year 1924 a special rule for that purpose; it would have sufficed to let the matter be dealt with under r. 97 of those same rules of 1924, and leave it to the general rule of the Supreme Court.

It may be that the proper way to regard this case is to

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Langton J.

treat it as a suit which is not properly constituted in that there has been a failure in an indispensable step of the procedure. One then turns to inquire whether it is the fault of anyone concerned in the administration of justice here that that indispensable step was not complied with. Clearly it could not be the fault of the Court, for everyone must be agreed upon reading the evidence that the Court had ample evidence upon which to act and indeed, as both counsel agree, could not have acted in any other way; nor could any inquiries on the part of the Court have ensured that that indispensable step, the service of the petition, was complied with. Whether in truth and in fact that step was complied with formally in whatever service was effected does not, I think, affect what is asked for here, because whether the petition was actually put into the hands of the respondent or not, there is, I think, sufficient in the material before us to make us feel at least gravely dissatisfied as to whether she had any real knowledge of what was going on. That in itself seems to me to be sufficient ground for a re-hearing.

There is one other matter which I should deal with. It has given my Lord here some particular matter for doubt whether he ought to have been one of those who considered or reconsidered this question—in that he was himself the trial judge. I take the view which was put forward by counsel for the wife, that not only is it not wrong that the judge who is the trial judge should be a member of the Divisional Court in a matter of this kind, but I think it is both right and desirable that he should, if possible, be a member of the Court which has to consider the question of re-hearing. It is to be observed that in no sense is any action of his impugned; *ex cencessis* no error by the nature of things can be imputed to him, and his recollection, slight perhaps, but nevertheless probably refreshed as the matter goes on—is of inestimable assistance in dealing with this very limited class of case. Therefore, in my view this Court was properly constituted in order to deal with this matter and had jurisdiction to deal with it. On the facts of the case

I need say nothing in addition to what my Lord has said. It is a case in which I think we could do no other than to give this woman an opportunity of being heard.

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Application allowed.

Solicitors for petitioner: *Maltz Mitchell & Co.*
Solicitors for the respondent: *Russell Jones & Co.*

R. M. M.

Referred to. POWELL v. POWELL [1951] P. 257

CHICHESTER *v.* CHICHESTER.

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Jan. 20; *Feb.* 12.

Dissolution of Marriage—Maintenance—Deductions from income of husband—Relative proportions of maintenance secured and ordered to be paid—Consideration of the Statutory factors for assessing maintenance—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, sub-ss. 1, 2.

The only considerations to be followed by the Court in assessing maintenance are first whether there shall be any and what security for the maintenance ordered, and further what sum if any it is reasonable to order to be paid in addition to the secured maintenance, having regard to the factors enumerated in the statute (1)—namely, the fortune of the wife, the ability of the husband and the conduct of the parties.

A covenant by a husband to provide for his child by a former marriage may affect the ability of the husband, but is not to be regarded as a liability which is to be deducted as a matter of law from the assessable means of the husband on which the Court has a discretion to allot reasonable maintenance.

The burden of an existing liability of the husband for costs incurred in legal proceedings between the husband and the wife may be considered under the directions of the statute as affecting

(1) 15 & 16 Geo. 5, c. 49, s. 190: "(1.) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable. (2.) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to, or instead of any order under sub-section (1.) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable."

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the ability of the husband and also as arising out of his conduct.

A deferred liability for premiums on the purchase of a house no longer occupied as the matrimonial home of the parties is not a legal deduction from the assessable income of the husband.

In cases where security is ordered, the relative proportion of the whole of the maintenance order to the part secured is a material factor in the assessment of the maintenance. An order that a substantial portion of the maintenance shall be secured may justify an assessment at a lower total amount, secured and unsecured, of the whole maintenance.

PERMANENT MAINTENANCE.

The petitioner, the Honourable Lady Moira Faith Lilian Chichester, obtained a decree absolute dated December 16, 1935, dissolving her marriage with the respondent, Sir Edward George Chichester, Bt., on the ground of his adultery. There was one child of the marriage, a son born October 13, 1925, who was a ward of Court. In due course the petitioner filed petitions for variation of ante-nuptial settlements made by either party and also for maintenance. No question calling for report arose upon the petition for variation of settlements. On the petition for maintenance the Registrar reported that the respective gross incomes of the parties had been agreed—namely, husband's 3893*l.*, wife's 600*l.*, but that the husband's income was subject to charges and that the question for the Court was as to the amount of deductions allowable in the assessment of the income for allotting maintenance. The following deductions were contested :—

(*a*) payments at the rate of 400*l.* per annum covenanted to be made to two children of the respondent by a former wife who had obtained a divorce from him.

(*b*) premiums on a policy to secure a loan and interest thereon, the money having been used to pay off a bankers' overdraft incurred to pay the costs of the present and other legal proceedings between the parties.

(*c*) instalments of the purchase price of a house.

(*d*) education of a son by the former marriage of the respondent.

Finally the report, in recommending an order for main-

tenance at the rate of 272*l.*, raised the question how much of this sum should be secured, and recommended security to the extent of 200*l.* per annum (both the sum secured and the balance of the maintenance to be limited during the joint lives) and the payment of a further sum of 40*l.* in respect of the child; all these sums to be less tax.

The petitioner moved to increase the total maintenance and the respondent to decrease it and that security should be refused.

Alexander Grant K.C., *R. Bush James* and *Victor Williams* for the petitioner. It is not in accordance with practice to allow as a deduction from the gross income of the respondent the upkeep of children by a former marriage: *Grafton* v. *Grafton* (1); *Hill* v. *Hill.* (2) The legal proceedings to defray the costs of which the policy was effected consisted in part of an unreasonable attempt to defend the present petition for divorce and in part of the institution of abortive Chancery proceedings for a rectification of a settlement. In both cases the costs were incurred in proceedings hostile to the petitioner and are not in any sense a set-off against the claim of the petitioner for maintenance.

The payments in connection with the purchase of a house arose from the provision of a matrimonial home which has been broken up by the conduct of the respondent.

The cost of the education of a son by the former marriage comes under the principle already asserted. The allowance of 40*l.* for the child of the marriage when with the petitioner is insufficient.

As to the amount of security, the Court will in a proper case order the whole maintenance to be secured.

[They referred to *Shearn* v. *Shearn.* (3)]

F. R. Evershed K.C. and *H. W. Barnard* for the respondent. The general principle of assessment is to ascertain the disposable income of the husband remaining after the allowance of necessary expenses to earn that income, *Martin* v.

(1) (1872) 27 L. T. 768. (2) (1864) 33 L. J. (P. & M.) 104.
(3) [1931] P. 1.

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Martin (1); *Dayrell Steyning* v. *Dayrell Steyning*. (2) *Shearn* v. *Shearn* (3) shows that not more than one-third to one-half of the maintenance should be secured in any ordinary case. There is nothing shown to take this case out of that category. The amount ordered to be secured is excessive having regard to the charges on his income that the respondent has to meet. These latter are properly allowable as deductions from his total income. An order for maintenance at the rate of 172*l.* would be reasonable with security for 100*l.* at most.

Grant K.C. in reply. The reduction in the available means of the respondent is due to his extravagance, and his conduct should be taken into consideration pursuant to the statute.

R. W. Goff for the trustees of the settlement.

THE PRESIDENT (SIR BOYD MERRIMAN). These are a motion and a cross-motion to vary the Registrar's report. Both parties are challenging the report in certain respects. The report deals both with variations of marriage settlements and with maintenance.

I have listened, not only to-day but on another occasion, to very full and helpful arguments on these matters, and the more I have listened to the arguments, the more I am satisfied that, in the main, the result of the extremely careful and patient hearing by the Registrar, who also had the benefit of hearing the same arguments and a certain amount of evidence, was extremely satisfactory. My only criticism of the report and of the arguments upon which, no doubt, it was based—because the same arguments have been addressed to me—is that, if anything, it adopts somewhat too rigid a line about what are supposed to be principles in connection with the granting of maintenance.

[The learned President dealt with the variation of settlements, and continued:]

I now come to the really difficult question of maintenance. In the main I think the result at which the Registrar has arrived satisfies me as being a thoroughly just

(1) [1919] P. 283. (2) [1922] P. 280.
(3) [1931] P. 1.

result; but I want to say a word about the arguments which were addressed to him, and to some extent given effect to by him, and which in turn have been addressed to me. This matter has been approached, in the argument for the petitioner, as if the proper method of settling this question were to start with some sum to which the wife is entitled. Counsel for the petitioner does not say that she is absolutely entitled to one-third of the joint income, but, admitting that there is a certain discretion as to the amount, he starts with the argument that one has to find what the proportion of the amount is to the whole available income, and having found what the proportion is, then to find how much of that is to be secured. On the other hand, counsel for the respondent, following a phrase in the Registrar's report, says that, having discovered what the proportion is and having decided that some of it is to be secured, the Court should not order more than one-third or one-half of the total maintenance to be secured. I wish to say again, as has been said so often by one or other of the judges of this Division, that I decline to recognize the existence of any rigid rule in maintenance as to the proportion to be given to the wife, and, speaking for myself, I decline to recognize that one has first to settle the proportion and then, having settled the proportion, to say how much of it should be secured. If there is any principle in this matter, it is this, that, whatever the practice in the old Ecclesiastical Courts with regard to alimony may have been, at any rate, so far as our present jurisdiction is concerned, it is based upon the statute of 1925, reproducing, of course, the earlier Matrimonial Causes Acts. I think the only principle to be observed is that one should follow the statute. The statute says this: "On any decree for divorce or nullity"—I am not reading all the words—"the Court may secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband" (that means his ability to pay, of course) "and to the conduct of the parties, the Court may deem to be reasonable." That is the first thing the Court is directed to do, or directed that it may do. The other is this: that in divorce or nullity,

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"the Court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1.)"—that is an order for security—"direct the husband to pay to the wife during the joint lives of the husband and the wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable." It is perfectly obvious, therefore, so it seems to me, that there is no principle obliging the Court to award a certain proportion of the joint incomes as maintenance and then to decide that no more than a certain proportion of the whole shall be secured—first what the proportion of maintenance is, and then how much of that shall be secured. What the Court has to decide on the whole matter, having regard to the considerations which the statute directs the Court to take into account, is whether there shall be any security at all, and, if so, whether it shall be a gross sum of money or any annual sum of money, and for what term, or whether there shall be nothing at all secured, and further, whether in substitution for security, or in addition to security what reasonable sum shall be paid. One has got to take all the circumstances of the case into account and arrive at a proper solution having regard to the factors which are mentioned in the statute.

Counsel for the petitioner says that in arriving at the proper proportion—and this again, to some extent, is matter for criticism in the report—as a matter of law certain things must be included, and certain things as matter of law must be excluded. The controversy has turned upon some three or four out of eight items which the husband is liable to pay. I am not going to use such words as "charges upon income," or anything of that sort. On the one side it has been argued that as a matter of law too little has been taken into account and too small a deduction has been made, and on the other side, that too large a deduction has been made before seeing what is the husband's liability.

The first of these items is 400*l.* a year, which he was liable to pay, under a deed of covenant, to the children of a former marriage. I may add that the particular husband in this case had already been divorced twice before the divorce

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resulting in this petition for maintenance. The details do not matter, but there is a covenant by which he has to pay 200*l.* a year to a former wife and 400*l.* to her children. Nobody has disputed that the 200*l.* to the wife has to be taken into account, but it has been argued as a matter of law that the 400*l.* cannot be deducted from the means of the husband, and by the following process of reasoning. It is stated in various passages in Rayden on Divorce that maintenance is dealt with, not indeed on the same principles—because the phrase is not used—but on similar grounds to those obtaining in alimony proceedings, and when you look at the heading "alimony" you are referred back to the principles stated with regard to alimony pendente lite. With regard to alimony pendente lite, there are two quite old cases which say that as a matter of general rule and in the absence of express circumstances, in settling the amount of alimony pendente lite the Court ought not to take into account the husband's liability to maintain the children of his former wife. Therefore, counsel says, it follows as a matter of law that a deed of covenant for the benefit of children of a former marriage cannot be taken into account in settling what should be the amount of maintenance. I profoundly disagree with that argument and I decline absolutely to be fettered in any such way. When Lady Chichester, the wife in the present suit, married Sir Edward Chichester, he was in fact under that liability by covenant both to his former wife and to his children by her. I am not going to say that the burden of that covenant must as a matter of law be deducted in arriving at any present calculation of maintenance. What I say is that it is quite plainly a circumstance which is to be taken into account, in the words of the statute, in considering the husband's ability, and I think ultimately all concerned in the argument agreed, in substance, that that is what it came to.

Similarly with regard to the next item, which both counsel in turn challenged—the one as too large and the other as too small—it appears that some sum, which nobody has been able precisely to estimate, but somewhere between 450*l.* and

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470*l.*, or thereabouts, is payable by the husband first of all, by way of premiums on a policy of assurance to secure a loan which now amounts to 2750*l.* with interest on the loan, and secondly, in respect of the annual payment of 200*l.* a year by which he has agreed to reduce the loan. This particular item, or group of items, seems to me to illustrate perfectly the undesirability of any attempt to fetter the Court in arriving at a proper figure for the wife's maintenance, because neither party has been able to suggest any principle by which any specific figure should be arrived at.

The Registrar has arrived at a figure which he thinks a fair one, taking all the circumstances into account, the various items of which this sum is composed, and the fact that the charge will diminish year by year, though not by very much. He has taken 150*l.* a year as the sort of figure which ought to be taken into account under the statutory directions as diminishing the husband's ability to pay and representing his past matrimonial conduct. I have listened to the arguments on the one side and the other to show why that sum should be diminished or increased. None of these arguments have satisfied me. I think the Registrar has arrived, if I may say so, at an extremely sensible view of the proper effect to be given to the circumstances represented by that figure.

The next item in controversy is the instalments of premium in respect of a house in which the husband is in fact living. The husband says that he, having agreed to pay the premium by instalments when he went into this house, ought to be allowed to deduct from his income this 100*l.* a year. That argument seems to me to be untenable. At any rate, I content myself with saying that I decline to hold that as a matter of law he is entitled to have it deducted, and as a matter of fact in this case I see no reason whatever why it should be deducted.

Those are the main items on the one side and on the other which have been treated before me as controversial. The result of what I have said is that, in my opinion, having regard to the wife's fortune, the husband's ability to pay, the conduct of the parties, and as a matter of reasonableness

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taking all the factors into account, the Registrar has arrived at an amount which I think is a very just figure, namely, 272*l.*, for the wife.

But there is one other circumstance which I think has to be taken into account in arriving at that figure. As against these charges there is the circumstance that the Registrar has thought it right, under the first sub-section, to order security for 200*l.* a year. Now I think it is a most material circumstance, in testing whether the total amount which the wife is getting is or is not reasonable and does or does not comply with all the considerations set out in the statute, to consider the advantages that she gets from having part of it secured. As I have already said, the security may be by gross sum, or it may be by an annual sum, and it may be for any term not exceeding her life. There is no question here of settling a gross sum, for the husband, in the main, so far as this part of the case is concerned, derives his income from a life tenancy of a particular estate. Therefore the Registrar has said: "I am going to limit the security to their joint lives." Nobody disputes the propriety of that. He has settled that the term is to be for their joint lives. She therefore does not get, it is true, the advantage obtained by a wife who gets security for her life and a survival of the maintenance thus secured after the death of the husband; but at any rate she does get this advantage, which is a considerable one, that the amount which is ordered to be secured is not subject to fluctuation. It is not variable in amount in any change of circumstances; it is fixed in all events. That, I think, is a very important factor, and in considering the propriety of the sum of 272*l.* at which the Registrar has arrived, I have taken into account, and I think there ought to be taken into account, the fact that so considerable a proportion of it has been ordered to be secured.

Now with regard to that proportion, an argument has been addressed to me that according to some supposed principle it ought not to exceed a third or a half of the total amount of maintenance ordered. I do not agree with that in the least. This is a case in which the husband derives his income

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from a settled estate, and the matrimonial history shows that his income has been diminishing in alarming proportions, having regard to liabilities which he has created—I will not say entirely by his own fault, or anything of that kind, but which he has created. I think this is eminently a case in which a very considerable proportion of the wife's maintenance should be secured to her under the first sub-section, and I entirely agree with the figure at which the Registrar has arrived; that is, that 200*l.* of it should be secured. It is upon the basis that I think that that is a fair and proper provision that I am satisfied that the whole figure of 272*l.*, in the circumstances of the case, is a fair one for the wife.

Now there only remains one other matter, and that is the sum in respect of the boy, the child of the marriage. I am very anxious not to do anything here which might seem even remotely to impinge upon the jurisdiction of the Chancery Division, in whose care this boy is, as a ward of Court; but the Registrar has included a sum of 40*l.* to be payable to the wife for the purpose simply of looking after the boy and reimbursing herself for the boy's expenses, including, amongst other things, his railway fares—because that is not covered at present by anything that has been done in the Chancery Division—during that part of the holidays, which is agreed to be half of the school holidays, during which he resides with her. She has only 40*l.* for that, and I think that amount is rather too small, now that I know that the husband's undertaking in the Chancery Division is limited to school bills, clothing, and similar items, and does not cover the cost of getting him to and from school and so on. It must be to some extent a matter of estimate, but I think that amount should be increased by some 18*l.*, making it 58*l.* altogether. In that I have made a rough guess as to railway fares, and I have also taken into account that, as things are at present, she does not, I think, get anything like 1*l.* a day for the time he is with her. After all, the whole essence of this is that she should be able to give the boy during the part of the school holidays for which she is responsible, something like

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the sort of life that he was accustomed to when the home was in being.

For the rest I confirm the Registrar's report. The petitioner will have the costs of an ordinary motion to confirm a report. The respondent must pay the costs of the trustees.

Solicitors for the petitioner : *Withers & Co.*
Solicitors for the respondent : *Gordon, Dadds & Co.*
Solicitors for the trustees : *Peake, Bird, Collins & Co.*

R. M. M.

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Feb. 5, 6, 7, 10, 11, 12.

Shipping—Collision—Navigation of the entrance to Harwich Harbour—Steam vessel navigating against tide—Approaching points or sharp bends in fairway—Bye-law 8 *of Harwich Harbour Bye-laws—Regulations for Preventing Collisions at Sea,* 1910, *art.* 25*—Pilot's report to Trinity House—Admissibility as evidence.*

Bye-law 8 of the Harwich Harbour Conservancy Board (1929) Bye-laws provides that : " a steam vessel navigating against the tide shall, on approaching points or sharp bends in the Fairway, ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

Art. 25 of the Regulations for Preventing Collisions at Sea provides that " In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

The plaintiffs' motor ship *E.* and the defendants' steamship *P.J.* came into collision in the entrance to Harwich Harbour on the west side of the channel (i.e., the *E.'s* side of the channel), about 800 feet above the Cliff Foot buoy, which lies to the westward and a little to the southward of Languard Point. The *E.*, which was outward bound and navigating against the tide, did not ease her speed on seeing over the land at Languard Point the *P.J.* approaching the harbour from the eastward and shaping to round the Beach End buoy, and it was alleged by the plaintiffs that bye-law 8 did not apply, as it was open sea beyond the channel marked by the Cliff Foot and Beach End buoys, and therefore that vessels might be approaching those buoys from any direction :—

Held, that bye-law 8 applied, and that the *E.* was to blame for not easing her speed in order to allow more time for the *P.J.* to round the bend ; that the *P.J.* was also to blame for getting

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on to her wrong side of the channel and not passing the *E.* port to port; that the *E.'s* initial act of negligence continued until her negligent proximity caused the master of the *P.J.* to give a wrong order which in fact brought about the collision; and that the proportions of blame were, the *E.* one-third to blame and the *P.J.* two-thirds to blame.

Shortly before the collision the master of the *P.J.* took the navigation of the vessel out of the hands of the compulsory pilot and countermanded his order, and the plaintiffs at the close of their case, anticipating that the defendants would not call the pilot, sought to put in evidence the pilot's statement made to Trinity House in compliance with their bye-laws.

Held, that the statement was not admissible.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the motor ship *Esbjerg*; the defendants were the owners of the steamship *Prinses Juliana*. The collision took place on the afternoon of June 29, 1935, in the entrance to Harwich Harbour. The *Esbjerg* was outward bound to Esbjerg with passengers, mails and cargo, and the *Prinses Juliana* was inward bound from Flushing with passengers and cargo.

The positions and manœuvres of the vessels, so far as material to the report on the applicability of bye-law 8 of the Harwich Harbour Conservancy Board (1929) Bye-laws, are fully set out in the judgment. The bye-law is in the following terms:—

"A steam vessel navigating against the tide shall, on approaching points or sharp bends in the Fairway, ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

Shortly before the collision the master of the *Prinses Juliana*, which had taken a very wide sweep into the harbour entrance round the Beach End buoy, thinking that the vessels would not clear port to port, took the charge of the ship out of the hands of the Trinity House pilot, countermanded the pilot's order, and tried to pass the *Esbjerg* starboard to starboard.

At the hearing the plaintiffs at the close of their case, anticipating that the defendants would not call the pilot of

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the *Prinses Juliana*, sought to put in his report made to Trinity House in compliance with their bye-laws. The plaintiffs had subpœnaed the pilot and also an officer of Trinity House, who produced the report in a sealed envelope.

H. G. Willmer and *Owen Bateson* for the plaintiffs. The report is admissible, as it was made by a person who in law was a servant of the defendants and for whose acts they were responsible (see s. 15 of the Pilotage Act, 1913). In *The Solway* (1) Sir James Hannen held that the master's report to his owners was admissible (2), and the pilot's statement to Trinity House, which he has to make under their bye-laws, is in the same category : see also *The Actæon* (3), where it was held that statements and admissions made by the master immediately after a collision were admissible.

[BUCKNILL J. The present statement was made after the pilot's employment by the defendants had ended, and very likely he would say that some one else was to blame.]

In *Nothard* v. *Pepper* (4) it was held that admissions made to a Receiver of Wreck were not admissible even for purposes of cross-examination, but the decision was based on the lack of authority of the Receiver to examine into questions as to which vessel caused the damage, and it does not touch the present point. It is true that in *The Lord Seaton* (5) a pilot's report to Trinity House was not admitted, but at the date of that decision shipowners were not responsible for the negligent acts of a pilot compulsorily employed by them ; he was therefore not their servant or agent empowered to make admissions, and this case is no longer an authority against the plaintiffs' contention. In *Kirkstall Brewery Co.* v. *Furness Ry. Co.* (6), a statement by a stationmaster to a police officer was held to be admissible as against the

(1) (1885) 10 P. D. 137.

(2) NOTE. The decision in *The Solway* was disapproved by the Court of Session in *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* 1909 S.C. 335; see also observations by Ronan L.J. in *Swan* v. *Miller* [1919] 1 I. R. 151, 178.—REPORTER.

(3) (1853) 1 Spinks, 176.

(4) (1864) 17 C. B. (N. S.) 39.

(5) (1845) 9 Jur. 603.

(6) (1874) L. R. 9 Q. B. 468.

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railway company, and similar considerations apply to a statement by a pilot to Trinity House. The defendants had to put the pilot in charge of their vessel on the terms that they would be responsible for any act of negligence committed by him, and with the knowledge that if he had a casualty it would be his duty to report it to Trinity House.

Carpmael K.C., *J. V. Naisby* and *E. E. Addis* for the defendants. This application has no merits; the plaintiffs have subpœnaed the pilot and they can obtain the best evidence by calling him into the witness-box. His statement, however, cannot be put in evidence. Although he was the servant of the owners so far, for example, as the doctrine of common employment is concerned (*Abram Steamship Co.* v. *Abram* (1)), the statement to Trinity House was not made in pursuance of any duty to the owners, and it stands in a totally different category to statements by responsible officers in a vessel's log which have to be entered in the ordinary course of their duty. In *The Actæon* (2), although an oral statement by the master was admitted, statements by the second mate, although he was in charge of the ship at the time of the collision, were held inadmissible. Similarly with regard to depositions, which are not admissible unless the persons making them are called as witnesses.

Willmer replied.

BUCKNILL J. This point, so far as I know, has never been decided. It is an important question, and I should have preferred to consider it before giving my ruling. That, however, would mean holding up the trial of the action, and it is better, therefore, that I should express my view at once.

The *Prinses Juliana* was in charge of a Trinity House pilot, and while in charge of her he was a servant of the owners of the vessel. After the service had come to an end he made a report to Trinity House in compliance with the rules and bye-laws passed by Trinity House under the Pilotage Act, 1913; and I presume that the contents of the report have been disclosed to the owners of the *Prinses Juliana* in

(1) (1925) 21 Ll. L. R. 167. (2) 1 Spinks, 176.

the ordinary course of events. The solicitors for the plaintiffs, very properly, have not interviewed the pilot or taken a statement from him, but they have subpœnaed him to attend here. They also subpœnaed the Trinity House authorities to produce the report, and it was brought into Court yesterday in a sealed envelope. The question now is whether that report is admissible as evidence on behalf of the plaintiffs.

Obviously, if justice is to be administered properly, the greatest precaution must be taken to see that the best evidence available is presented to the Court and that its judgment is grounded on reliable evidence. The chief safeguards in that respect are, first, that the evidence should be given in open Court ; secondly, that it should be on oath ; and thirdly, that it should be subject to cross-examination. This report, if it is to be put in, is not tested in any of these ways. It is not made on oath, and there is no direct statutory duty on the part of the pilot to make it ; he is not cross-examined on it ; and he does not appear before me. Primarily, therefore, the evidence is objectionable on those grounds.

Mr. Willmer, however, has argued that the report ought to be received on the ground that it is an admission by a man who is the servant of the defendants. But the authorities all point out two things, conveniently set out in Taylor on Evidence, 12th ed., s. 602, p. 381, in a statement as to the admissibility of the declarations of agents against their principals, where he says that " the principal constitutes the agent as his representative in the transaction of certain business . . . . and, as Story J. observes, ' where the acts of the agent will bind the principal, there his representations, declarations and admissions, respecting the subject matter, will also bind him, if made at the same time, and constituting part of the res gestæ.' " They are original evidence and not hearsay, and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them.

I do not think that the pilot here was an agent of the shipowners for the purpose of making any admissions of this kind ; moreover, the admission was not made at the time when he was in their service but after the employment had

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ceased and when he had reverted to his position as an independent pilot. That seems to me to be dealt with in the second part of s. 602, where it is stated that the party's own admission, whenever made, may be given in evidence against him, but that the admission of his agent is binding on the principal only when it is made during the continuance of the agency in regard to a transaction then pending.

For these reasons I think that this report of the pilot is inadmissible as evidence against the owners of the *Prinses Juliana*.

The hearing then continued, and the defendants having called their evidence and closed their case without calling the pilot of the *Prinses Juliana*,

Willmer, for the plaintiffs, suggested that the Court should exercise its right to call the pilot with the consent of the parties (*In re Enoch and Zaretzky, Bock & Co.* (1)), but the defendants refused their consent.

Willmer for the plaintiffs. Bye-law 8 does not apply. Beyond the entrance between the Beach End and Cliff Foot buoys is the open sea, and vessels can approach from any direction. There is no fairway or dredged channel outside ; the Beach End buoy is the terminus. There is no definition of " the Fairway " (which is spelt with a capital " F ") in the bye-laws, but bye-law 8 should be read in conjunction with bye-law 13, which provides that " vessels shall anchor clear of the Fairway indicated by the pecked lines between the Beach End buoy and Guard buoy as shown on the Admiralty chart."

If " the Fairway " extends beyond the Beach End buoy, then the narrow channel rule (art. 25 of the Regulations) applies, and the *Prinses Juliana* is to blame for being on the wrong side of the channel. It was only by taking the very wide sweep round the Beach End buoy that she created a position which she describes as rounding a sharp bend ; she should have completed her turn outside the buoy. It is for her to show that she got on to the wrong side of the channel without negligence : *The Fredavore.* (2)

(1) [1910] 1 K. B. 327. (2) (1927) 29 Ll. L. R. 45.

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The object of bye-law 8 is to prevent vessels meeting on the apex of the point : *The Braa* (1), and a vessel in the straight need not wait until vessels that may be seen across the land have passed clear : *The Margaret.* (2) The two ships would have passed each other all clear port to port if the pilot's orders had not been countermanded by the master of the *Prinses Juliana.* [Reference was also made to *The Blue Bell* (3) ; *The Treherbert* (4) ; and Stuart Moore's Rules of the Road at Sea, 4th ed., p. 420, note 1.]

Carpmael K.C. for the defendants. Bye-law 8 applies ; the approach to the harbour is a narrow channel. Owing to the shoals it is only quite small craft that can approach " from any direction," as the plaintiffs allege. " The usual approach . . . . is through the Rough Channel. At Beach End shoal the channel turns sharply northward and runs N.N.E. for a mile, having Cliff Foot and the Shelf on one side and Beach End shoal and detached patches on the other." And " vessels whether approaching from the N.E., E., or S. must make for Cork light vessel " (see Directions in the North Sea Pilot, 10th ed., 1933, p. 231). The *Prinses Juliana* coming with the tide, therefore, was entitled to expect the *Esbjerg* to ease her engines and hold back until the *Prinses Juliana* had rounded the bend at the entrance to the harbour : see the observations of Scrutton L.J. in *The Hontestroom.* (5) By not doing so the *Esbjerg* created a position of danger which led the master of the *Prinses Juliana* to take what was the best action under the circumstances—namely, to try to pass the *Esbjerg* starboard to starboard.

Willmer replied.

Cur. adv. vult.

1936. Feb. 12. BUCKNILL J. read the following judgment : This case arises out of a collision between the twin screw motor ship *Esbjerg* and the twin screw steamship *Prinses Juliana* in the entrance to Harwich Harbour about 6.40 P.M. British summer time on June 29, 1935.

(1) (1929) 34 Ll. L. R. 137.
(2) (1884) 9 App. Cas. 873.
(3) [1895] P. 242.
(4) [1934] P. 31.
(5) (1925) 22 Ll. L. R. 458.

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The *Esbjerg* is 2762 tons gross, 322 feet long and 44 feet beam. At the time of the collision she was outward bound from Harwich on a draught of 12 feet 9 inches forward and 14 feet 9 inches aft. She was manned by a crew of 48 hands and had 134 passengers on board.

The *Prinses Juliana* is 2907 tons gross, 365 feet long and 42 feet beam. At the time of the collision she was inward bound to Harwich and was drawing 11 feet 1 inch forward and 13 feet 7 inches aft. She was manned by a crew of 66 hands and had 311 passengers and mails on board. Each vessel was in charge of an experienced Trinity House pilot. Pilotage was compulsory for each vessel.

The weather was fine and clear, there was no material wind, and the tide was about an hour's flood of the force of 1½ to 2 knots. At the time when the vessels became clearly visible to one another the *Esbjerg* was proceeding down the harbour and was making about 12 knots. The *Prinses Juliana*, on the other hand, was outside the entrance to the harbour and was proceeding to the westward before making the turn into the entrance. The *Prinses Juliana* was making about 16½ knots, which was shortly afterwards reduced to 15 knots.

The vessels remained in sight of one another, and collided at an angle of 2 to 3 points, the stem and starboard bow of the *Esbjerg* striking the starboard side of the *Prinses Juliana* a little abaft amidships, just above the water line, and doing great damage.

The precise place of the collision was in issue : the evidence on this point varied between 400 and 1500 feet to the northward of the Cliff Foot buoy. The captains of both ships agreed that the collision was well to the westward of mid-channel. According to the evidence from the *Esbjerg*, which I accept, the *Esbjerg* duly got on to a course of S.W. by W.½S. magnetic and came down the harbour on her own starboard side of the channel with the Cliff Foot buoy right ahead, at a speed of about 12 knots. As the two vessels approached one another those in charge of the *Esbjerg* noticed that the *Prinses Juliana* was taking a very wide sweep into

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the harbour round the Beach End buoy. The *Esbjerg* continued on her same course and speed, expecting the *Prinses Juliana* to come round in time to pass the *Esbjerg* port to port. But when the *Prinses Juliana* was about 400 yards away and was from a point to a point and a half on the port bow of the *Esbjerg* and was still about two points off her proper course up the harbour the *Prinses Juliana* stopped her swing to starboard and sounded two short blasts. The engines of the *Esbjerg* were at once stopped and put full speed astern, the wheel was put hard-a-port and her whistle was sounded two short blasts, but the *Prinses Juliana* crossed the *Esbjerg's* bows and the collision happened.

According to the witnesses from the *Prinses Juliana*, she reduced her speed to 15 knots just before reaching the Rolling Ground buoy. When she was about 200 yards south-east of the Beach End buoy and had the Beach End buoy and the Cliff Foot buoy in line, the wheel was put to starboard by order of the pilot. The master then came on the bridge after a short absence. Shortly afterwards, when this buoy was abeam and about 200 feet off the wheel was put hard-a-starboard by order of the pilot. Both these helm orders were given for the purpose of rounding into the harbour.

When the *Esbjerg* was about 3 or 4 cables distant and was bearing 4 to 5 points on the starboard bow of the *Prinses Juliana*, which was heading about N.W.$\frac{1}{2}$N. and was under hard-a-starboard wheel, the master of the *Prinses Juliana*, according to his evidence, said to the pilot: "You won't clear her (meaning the *Esbjerg*), you will have to steady her." The pilot made no reply and gave no order, and the master himself then told the helmsman to steady the ship and immediately after the order to steady the helm the master of the *Prinses Juliana* gave the order hard-a-port, and stopped both engines and ordered two short blasts to be sounded. No reply was heard from the *Esbjerg*, and the master then put both engines full astern for a few revolutions and sounded two short blasts again, then stopped both engines and gave a third signal of two short blasts, and then put the starboard engine full ahead and port engine full astern for a few

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revolutions and then stopped both engines, and, just before the collision, put port engine full ahead and starboard engine full astern and put the wheel hard-a-starboard so as to try to make a glancing blow of it. A few seconds before the collision the *Esbjerg* was heard to sound two short blasts.

It will be seen on comparison of the two cases that there is not really much conflict as to the essential facts leading up to the collision. There is some discrepancy as to the number of whistle signals sounded by the *Prinses Juliana* and the precise moment when the *Esbjerg* sounded her two short blasts. As to this, I find that the *Esbjerg* replied after an interval of a few seconds to the first signal of two short blasts from the *Prinses Juliana* and that they did not hear any further signal from the *Prinses Juliana*—this being probably due to the excitement caused by the impending collision. I think that those on the *Esbjerg* would naturally notice the check in the swing to starboard of the *Prinses Juliana* a little after the order was given on board the *Prinses Juliana*, and that there is no substantial discrepancy on this point. The vessels would have also drawn closer by the time the checking of the swing to starboard of the *Prinses Juliana* was noticed on the *Esbjerg*. It must be borne in mind that the vessels were closing on one another at the rate of about 900 yards a minute.

When two fine, well equipped and handy vessels such as the *Esbjerg* and the *Prinses Juliana*, each in charge of an experienced Trinity House pilot and manned by experienced master, officers and crew, and each accustomed to go in and out of Harwich Harbour, thus collide on a fine summer afternoon it is clear that there was serious negligence somewhere. The explanation of the collision given by the *Esbjerg* is that the *Prinses Juliana* suddenly changed her mind and went to port, and in so doing turned a position which was safe or momentarily becoming safe into a position in which a collision was inevitable. The explanation of the master of the *Prinses Juliana* is that the vessels were never in a position which was safe or becoming safe, and that the only possible chance of averting a disastrous collision was to do what he did.

Upon this conflict of views the Court did not have the advantage of hearing the evidence of the pilot of the *Prinses Juliana*. The defendants elected not to call the pilot as a witness. The plaintiffs, the owners of the *Esbjerg*, had subpœnaed him but did not call him as a witness. The plaintiffs sought to put in as evidence in support of their case the report which the pilot of the *Prinses Juliana* made to Trinity House after the accident in accordance with the rules and bye-laws of Trinity House, but the defendants objected to this course on the ground that the report was inadmissible as evidence. I upheld the objection. The absence of the pilot as a witness for the *Prinses Juliana* together with his silence when spoken to by the master, as to which I have already referred, leads me to think that the pilot considered that his orders were proper and that the master was wrong in interfering with these orders while the *Prinses Juliana* was entering the harbour.

The first question I have to decide is whether the action of the master of the *Prinses Juliana* in giving the orders which he gave was unseamanlike. The fact that the pilots on each of the vessels concerned were apparently satisfied with the position indicates that in their view the vessels would clear one another without any action or further action on their part.

I saw the master of the *Prinses Juliana* in the witness-box. He has an excellent record, and has been in command of the *Prinses Juliana* for fifteen years. I am satisfied that when he countermanded the order of the pilot he believed that the vessels could not clear if the *Prinses Juliana* continued her swing to starboard, and that he acted as he thought for the best in the interests of his passengers and crew and ship.

Having regard to the speed of each vessel and the turn which the *Prinses Juliana* had still to make to get port to port with the *Esbjerg* at the time when the master gave the order to steady the wheel I think that the master had some cause for anxiety. But I think Mr. Willmer's contention was right that if the master sees fit to take the navigation out of the hands of the pilot and countermands his orders, he must

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satisfy the Court that he was justified in so doing, and that the action which he took was at all events more calculated to avoid a collision than the manœuvre which he countermanded.

The point which I have to decide on this aspect of the case seemed to me to be a matter on which I should consult the Elder Brethren. I have accordingly asked the Elder Brethren to assume the course and speed of the *Esbjerg* to be as already stated in my judgment, and the position of the two ships to be as stated by the master of the *Prinses Juliana* and stated by me in my judgment, at the time when the master of the *Prinses Juliana* ordered the helm to be steadied. Upon these assumptions, which are my findings of fact, I have asked the Elder Brethren to advise me whether in their view there was a risk of collision if the *Prinses Juliana* had continued on with her manœuvre and the *Esbjerg* had continued on her course and speed. Their answer to this question is that in their view the *Prinses Juliana* would have cleared the *Esbjerg* with a safe margin and passed her port to port if she had continued on with both her engines working at full speed ahead and her wheel hard-a-starboard, and the *Esbjerg* had kept her course and speed.

I have also consulted the Elder Brethren on this further question. Assuming there was risk of collision which required action by the master of the *Prinses Juliana* did he take the action which a skilful seaman ought to have taken? The answer of the Elder Brethren to this question is emphatically that the master of the *Prinses Juliana* took the wrong action. In their view the captain of the *Prinses Juliana* in any case ought not to have given an order to go to port under the circumstances, but, if he thought action was required, he should have kept the wheel hard-a-starboard and the port engine full ahead and have slowed or stopped his starboard engine, and thereby accelerated his turn, or alternatively, he should have gone full speed astern with both engines. According to the evidence of the master of the *Prinses Juliana*, his ship can be pulled up in three ships' lengths from full speed by going full astern. I agree with this advice of the Elder Brethren to both these questions.

The collision which was brought about was in fact very near a disaster. A strip of about 100 feet of the starboard plating and belting of the *Prinses Juliana* was peeled off by the stem of the *Esbjerg*, and if this damage had been below the water instead of being just above it, there would probably have been serious loss of life.

I have now to consider how it came about that this condition of things which gave the master some cause for anxiety arose, and whether either of the two ships was to blame for causing such a state of things to come into being. On this part of the case I have to consider two main questions. The first one is whether the *Esbjerg* committed a breach of bye-law 8 of the Harwich Bye-laws.

In my view this bye-law applied. I think that the *Esbjerg* was approaching a point or sharp bend in the Fairway and that it was her duty to act under the bye-law. I think she committed a breach of the bye-law in not easing her speed and that this breach contributed to the collision. The question as to the gravity of the breach by the *Esbjerg* appears to me to depend mainly on the place of collision, and on the way in which the *Prinses Juliana* in fact rounded the point or sharp bend.

In coming to a decision on this part of the case I have to consider and weigh the evidentiary value of the position of the wreckage as found, and of the photograph of the *Prinses Juliana* taken by Mr. Lucas shortly after the collision. I think it is possible that the wreckage as located was not in the precise position of the two ships when the piece of wreckage was sheered off or was torn off. It is possible that the wreckage was carried on a little by the stem of the *Esbjerg*.

After considering the matter carefully and consulting with the Elder Brethren as to this point, and also as to the possibility of movement of the wreckage by attachment of the dredger to it, by influence of passing ships or by a possible error in taking the sextant angles, and after considering the oral evidence and especially from those in charge of the ship and of Mr. Learmont, a reliable witness, I find that the collision took place about 800 feet from the Cliff Foot buoy and well over on the west side of the Fairway.

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On this finding of fact it appears to me that the *Esbjerg* not only committed what might be considered a technical breach of the rule by not easing her speed, but that the position of the *Prinses Juliana* was in such proximity to the apex of the turn that it was necessary for safety that the *Esbjerg* should take off her way sufficiently to give the *Prinses Juliana* more time and room to get round.

I therefore find the *Esbjerg* to blame for a substantial breach of bye-law 8. Even if the bye-law does not apply I should find that she was to blame for breach of good seamanship in not reducing her speed when approaching the point and the *Prinses Juliana.*

The questions that remain are these: (1.) Whether the *Prinses Juliana* was also to blame for not keeping to her own proper side of the channel in making the turn? (2.) Whether the *Esbjerg* was negligent in not taking proper action immediately those in charge of her saw the *Prinses Juliana* check her swing?

Art. 25 of the Collision Regulations applies to these waters and is in the following terms: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel." It is to be noted that the rule says "when it is safe and practicable." Having regard to the existence of bye-law 8, which I have held applies in this case, and to the state of the tide, and to the length of the *Prinses Juliana*, I do not think that the *Prinses Juliana* was negligently navigated up to the time when the master ordered the wheel amidships. Up to that time I think the *Prinses Juliana* had kept in her proper water, and as I have already said, would have cleared the *Esbjerg* port to port. Her breach of art. 25 arose when the master gave the steady and hard-a-port order.

As regards the other point, I am unable to see any ground for saying that the *Esbjerg* was negligent after she heard two short blasts from the *Prinses Juliana.* On both these points my views are supported by the advice of the Elder Brethren.

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In the result, therefore, the *Esbjerg* committed the initial act of negligence and this negligence continued until the *Prinses Juliana* also committed an act of negligence which in fact brought about the collision. But the negligence of the *Esbjerg* contributed to the collision, because it was her negligent proximity which led the master of the *Prinses Juliana* to give a wrong order.

Having regard to the fact that the master of the *Prinses Juliana*, wrongly as I think, and without any justification, took the matter out of the pilot's hands, and without the pilot's consent, and gave a wrong order without which no collision would have happened, I think the preponderance of blame is clearly on the *Prinses Juliana*.

I apportion the blame as follows—two-thirds to the *Prinses Juliana* and one-third to the *Esbjerg*. There will be no order as to costs.

Solicitors for the plaintiffs : *Thomas Cooper & Co.*

Solicitors for the defendants : *Stokes & Stokes.*

E. C. M. T.

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Feb. 20, 21, 25.

Shipping—Collision—Tug and tow—Construction of towage Contract—Port of London Dock Bye-laws, 1928, *bye-law* 19.

The *B.*, a tug belonging to the plaintiffs, the Port of London Authority, came into collision with the defendants' steamship *C. C.* in Tilbury Dock. The *B.* and another tug, the *S.*, which also belonged to the plaintiffs, were under contract to tow the *C. C.* from lock to berth. The *S.* was made fast ahead of the *C. C.* and was towing her, and the *B.* was proceeding to the *C. C.* which had passed through the lock into the dock when the *B.* was struck by the revolving propeller of the *C. C.* The collision was entirely due to the improper way in which the *B.* was handled through those on board not realizing that the *C. C.* had twin screws.

The dockmaster had given the appropriate signal for the *C. C.* to come ahead on her main engines, and it was not disputed by the plaintiffs that it was the universal practice of all ships navigating through the dock to use their main engines and that

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no complaint about such use had ever been made by the plaintiffs. They contended, however, that the defendants had committed a breach of bye-law 19 of the Port of London Dock Bye-laws which provides that " no person shall work, or cause to be worked, the propelling engines of any ship in the dock for any purpose except with the previous consent of the dockmaster, and at such time and place and in such manner as he shall approve. Penalty £5." " Such consent is only to be given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines and will indemnify and save harmless the Authority and its officers against all claims in respect of such damage."

The plaintiffs further contended that by cl. 4 of the towage contract the defendants agreed to pay for any damage to any of the plaintiffs' property (including the tug or tugs engaged in the towage) which might arise from collision even if caused or contributed to by the negligence of any servants of the plaintiffs. The defendants contended that cl. 4 did not apply inasmuch as under cl. 1 the towage was " deemed to commence when the tow rope had been passed to or by the tug." The plaintiffs' reply was that the towage was to be done by two tugs and that it commenced when one of the tugs, namely the *S.*, had started towing :—

Held, (*a*) that bye-law 19 did not apply at the time in question, but that, even if it did, the defendants did not commit a breach of it because the consent of the dock master to use the engines had been given ; (*b*) that the towage contract could be fairly interpreted as meaning that the towage should be deemed to have commenced when the tow rope had been passed to each of the two tugs, and that until that had been done the ordinary provisions of the common law applied to the rights and duties of each party ; and (*c*) that accordingly the defendants were entitled to succeed on the claim and counterclaim.

ACTION of damage by collision.

The plaintiffs were the Port of London Authority (hereinafter referred to as the P.L.A.) ; the defendants and counterclaimants were the owners of the steamship *Clan Colquhoun*.

The case is only reported on the construction of the towage contract and bye-law 19 of the Port of London Dock Bye-laws.

The collision occurred between the plaintiffs' steam tug *Beam* and the *Clan Colquhoun* in Tilbury Main Dock. The *Beam*, which, with another of the P.L.A.'s tugs, the *Sirdar*, was under contract to tow the *Clan Colquhoun* from lock to berth, was struck by the revolving propeller of the ship. When the *Clan Colquhoun* was in the entrance lock the dock master

sounded the recognized signal for her to come ahead on her engines and she put her engines slow ahead and came through the entrance into the dock. The *Beam*, which was lying in the dock waiting for her, proceeded towards her to make fast and fell against her starboard side aft. At this time the *Sirdar* had already made fast ahead and was towing the *Clan Colquhoun*.

The plaintiffs alleged that the defendants in breach of bye-law 19 [set out in the headnote] improperly worked the starboard engine of the *Clan Colquhoun* and failed to stop it. They further relied on the towage contract and in particular on the following clause :—

Clause 4. " The owner or owners of and/or the person or persons interested in the ship vessel or craft so being towed or transported hereby agree and undertake to bear and pay for any loss of or damage to any of the Port Authority's property (including the tug or tugs engaged in such towage or transport) or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes perils or other things viz. :—perils of the seas rivers or navigation, collisions, ... whether such causes perils or other things have been caused or contributed to by the negligence default or error of judgment of any officers or servants of the Port Authority whatsoever . . . ."

The defendants admitted the contract, but pleaded that so far as the *Beam* was concerned the performance of the contract had not commenced as provided in cl. 1, which was as follows : " For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug . . . ."

They alleged that the cause of the accident was due to the mishandling of the tug by the plaintiffs and their failure to pay any attention to the notice boards on the ship inscribed " Twin screws. Keep clear of the blades." They also alleged that the tug was improperly manned in that a deck hand was in charge of her.

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H. G. Willmer for the plaintiffs. Assuming (contrary to the plaintiffs' contention) that the *Beam* was negligent, the plaintiffs are still entitled to recover under cl. 4 of the towage contract. The towage commenced, according to cl. 1, when the tow rope had been passed to or by the tug. The contract was for two tugs and at the time of the accident, although the tow rope had not been passed to the *Beam*, the *Sirdar* was fast and actually towing. The towage, therefore, had commenced. There cannot be an interregnum after the time when the contract applies to the one tug. The accident occurred both "in the course of and in connection with" the towage, and the case, therefore, is distinguishable from *The Carlton* (1), where the accident was held not to have occurred "in connection with" the towage. The whole cause of the trouble was the improper working of the engines in breach of bye-law 19, under which, even if permission is given to work the engines, the defendants are responsible and must indemnify the P.L.A. against all claims in respect of damage caused by such working. The bye-laws were confirmed by the Minister of Transport in pursuance of the powers conferred on him by the Port of London (Consolidation) Act, 1920; and in respect of the breach of a statutory duty there is no defence; the defendants are liable both to a penalty and damages: see cl. 82 and *Davies* v. *Thomas Owen & Co.* (2) [Reference was also made to *The Northborough* (3) and Bucknill's Tug and Tow, 2nd ed., p. 28.]

R. F. Hayward K.C. for the defendants. The towage conditions never became applicable as regards the *Beam*, for she had not started to perform her part of the contract. If the P.L.A. desire to protect themselves in respect of damage of this sort they must do so in clear terms. On their construction of the conditions, once the *Sirdar* was fast the *Beam* could have done or sustained damage while nowhere near the *Clan Colquhoun* and the defendants would be liable. Also, the words in cl. 4, "the ship . . . . so being towed" mean,

(1) [1931] P. 186, 194. (2) [1919] 2 K. B. 39.
(3) (1923) 15 Ll. L. R. 119.

in the present case, towed by two tugs; and further, the *Beam's* negligence in falling against the after part of the ship, due to the failure to realize that the ship had twin screws, was a blunder which did not arise " in connection with " the towage, and the decision in *The Carlton* (1) is in point. Tugs have to take on themselves the main burden of keeping clear: see *The Age* (2) cited with approval by Lord Fleming in *The Glengarry*. (3)

As regards bye-law 19, the context of the bye-laws as a whole shows that they are framed for the good conduct and government of the docks generally, and the bye-law cannot be intended to apply to vessels navigating through the dock. They could not reach their berth if they did not use their engines. It is admitted that the P.L.A. allow every ship coming into the dock to disregard the bye-law, and they could not do otherwise, for if the engines may only be used " in such manner " as the dock master shall approve it would necessitate his being on the bridge of every vessel going in or out. Suppose, for example, a tow rope breaks, can it be suggested that those on the ship must get the consent of the dock master and give an indemnity before she can put her engines astern? Such considerations show that the bye-law can only apply, if at all, to vessels already moored, which by turning over their engines might create a wash and do damage.

[Reference was also made to *Spaight* v. *Tedcastle* (4).]

Willmer replied.

Cur. adv. vult.

1936. Feb. 25. BUCKNILL J. read the following judgment. In this case the plaintiffs, the P.L.A., are the owners of the steam tug *Beam*. The defendants and counterclaimants are the owners of the steamship *Clan Colquhoun*.

The *Beam* is a twin screw tug of 91 feet in length, and at the material time was in charge of a man called Porter. The *Clan Colquhoun* is a twin screw vessel of 450 feet in length and has a cruiser stern. Each propeller has four blades and

(1) [1931] P. 186.
(2) (1923) 17 Ll. L. R. 172.
(3) (1926) 25 Ll. L. R. 374.
(4) (1881) 6 App. Cas. 217.

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the extreme tip projects about two feet outside the counter. Each propeller is about 17 feet from the stern.

The collision occurred about 8.34 a.m. on May 16, 1935, in Tilbury Main Dock near the New Lock entrance. The weather was fine and clear; there was no wind and no tide. The *Beam*, which was under contract to make fast and tow the *Clan Colquhoun*, was struck three blows on her port side aft by the revolving starboard propeller of the ship.

The material facts as I find them are as follows: When the *Clan Colquhoun*, which was bound in to the Main Dock from the lock, cleared the lock entrance, the *Beam*, which was then lying off the southern side of the new entrance, proceeded to her and fell alongside her starboard side abaft amidships. The ship at this time had the P.L.A.'s tug *Sirdar* fast ahead towing her, and the ship was also using her main engines which were working at slow ahead. The ship was making about two to three knots. The ship was exhibiting the following notice in large lettering on the poop rails on either side: "Notice. Twin screws. Keep clear of the blades."

In my judgment Porter ought to have known before he went alongside the ship that she had twin screws. He saw that the ship was using her own engines, but there would not be sufficient swirl of water to clearly indicate that the ship had twin screws. Because he did not realize that the ship had twin screws, he came alongside her in a way which he thought proper if she had been a single screw ship, but which he would not have done if he had known that she had twin screws.

Having come alongside the ship on more or less the same heading as the ship, with his port engine working ahead and his starboard engine stopped, and in a position in which his stern was not more than 30 feet forward of the revolving starboard propeller, he then stopped his port engine and put his starboard engine slow ahead, and one of the tug's crew threw a heaving line on to the ship's deck. There was a very short delay on the part of the ship's crew in taking hold of the heaving line, and then one of her crew picked it up and carried it aft in order to make it fast to the end of the ship's tow rope which was lying all ready for use on the ship's poop.

Whilst this was being done, Porter allowed the *Beam* to fall astern towards the ship's stern and to get dangerously near the revolving starboard propeller. The ship was under slight port wheel and her stern was tending to come towards the tug. As soon as the tug started to draw dangerously near the propeller of the ship, the second officer, who was on watch aft, hailed the tug to go ahead and keep clear of the propellers, and almost immediately afterwards telegraphed to the bridge to stop the engines, and this was done, but before the starboard propeller was in fact stationary it struck the tug three blows, with three different blades. A second or two before the first blow the tug sounded a series of short blasts to indicate that she was in difficulties.

On these facts each side has blamed the other for the accident. In my view the accident was wholly due to the improper way in which the tug was handled by reason of the ignorance of her acting master about the position of the propellers of the ship. In consequence, the tug was improperly allowed to drop back along the ship's side. I think that the tug could, without any difficulty on her part, have kept clear of the propeller up to a very short time before the accident if Porter had been so minded. In my view those in charge of the ship acted as soon as they could be reasonably expected to act under the circumstances.

It is true that the pilot of the ship on the bridge, and the second officer aft, saw that the tug came alongside in a position in which it was necessary for her to be very careful if she was to keep clear of the starboard propeller. But I think that the pilot and the second officer were entitled to expect the *Beam* to take the necessary steps to keep clear of the propeller. The *Beam* is a twin screw tug with powerful engines, and there would have been no difficulty in keeping her clear of the propeller after she had come alongside of the ship if the acting master had wished to do so, and which he would have done if he had been aware of the position of the propeller. Looking back, no doubt, it seems that it would have been a wise precaution for the pilot of the ship to have stopped the engines as soon as he saw the tug come alongside. This was

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an act which the pilot said it was unusual for the tug to do, and he said, to quote his own words, that the tug was " too far aft for my liking." I do not think, however, that he was negligent not to stop the starboard propeller at once. As Hill J. remarked in *The Age* (1), " Tugs which are making fast to a ship necessarily take upon themselves the main burden of keeping clear." I think that, apart from a possible breach of bye-law 19, the plaintiffs have failed to establish that the navigation of the ship was negligent.

I have now to consider the point made by the plaintiffs as to the alleged breach of bye-law 19. The existing Port of London Dock Bye-laws were confirmed by the Minister of Transport on September 20, 1928, and bye-law 19 is in the following terms: " No person shall work, or cause to be worked, the propelling engines of any ship in the dock for any purpose except with the previous consent of the dock-master, and at such time and place and in such manner as he shall approve. Penalty £5." " Such consent is only given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines and will indemnify and save harmless the Authority and its officers against all claims in respect of such damage."

Bye-law 2 gives certain definitions and states that a " ' dock ' means any dock of the Authority and any part of a dock, and any basin, lock, cut, or entrance connected therewith, and includes the quays, wharves, walls, jetties, and piers of such dock." Dockmaster means the dockmaster of such premises, " and shall include his and their duly authorised deputies and assistants," and " ' ship ' means every vessel not propelled by oars which is intended to go to sea, or which is intended to carry passengers, for profit or pleasure."

It was argued on behalf of the P.L.A. that at the time of the collision the ship was admittedly using her propelling engines and that no consent of the dockmaster had been obtained; that the ship had, therefore, committed a breach of the bye-law and that the damage to the tug was caused

(1) 17 Ll. L. R. 172, 173.

by this breach. On this bye-law the following questions arise: First, did the bye-law apply to the *Clan Colquhoun*, which was navigating in the dock with the permission of the P.L.A.? Secondly, if the bye-law did apply, had the defendants obtained the previous consent of the dockmaster to use the propelling engines of the ship, and, thirdly, can it be said that the mere breach of the bye-law affords a cause of action to the plaintiffs to recover the amount of the damage caused by the breach?

So far as the *Clan Colquhoun* is concerned, on this particular morning the course of conduct by the parties had been as follows: The owners of the ship asked the P.L.A. to supply two tugs to tow the vessel from lock to berth on certain terms. In pursuance of this request two tugs, the *Sirdar* and the *Beam*, were detailed for the towage. In accordance with the usual practice the *Sirdar* made fast ahead and towed, and the *Beam* was preparing to make fast astern. The *Beam's* job was to assist the ship to make a right-angled turn under port wheel into her berth in the East branch dock. From the entrance lock to the ship's berth is roughly about 1000 yards.

When the ship was in the entrance lock and the inner gates were open the dockmaster sounded a signal of two short blasts, which is the usual signal for the ship to come ahead on her main engines. The ship's engines were then put ahead with the knowledge of the dockmaster, and the ship steamed out of the lock. After she had been going ahead on her engines for about two minutes the *Sirdar* made fast ahead, and the ship continued to work her engines slow ahead until the collision, which occurred about two minutes after the *Sirdar* made fast. It was proved on behalf of the ship, and not disputed on behalf of the P.L.A., that it was the universal practice of ships of the Clan line, and indeed of all ships navigating through the dock as this ship was doing on this occasion, to use their main engines to assist in the towage, and that no complaint about such use had ever been made by the P.L.A. Porter, the acting-master of the *Beam*, admitted that there was nothing unusual in the *Clan Colquhoun* using her engines and that it was usually done.

In my view bye-law 19 did not apply to the *Clan Colquhoun*

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at the time in question. If the bye-law applied, I think that the ship did not commit a breach of it because the previous consent of the dockmaster to use the engines was given. If the *Clan Colquhoun* did commit a breach, then the damage was caused partly by the negligent navigation of the tug and partly by the breach of the bye-law. It is not necessary for me to decide the nice question whether the defendants would be liable to the plaintiffs for damage contributed to by a breach of the bye-law, and whether in such a case as this s. 1 of the Maritime Conventions Act, 1911, would apply, and, if so, how the liability should be apportioned.

The next point that arises is as to the construction of the towage contract. The P.L.A. contended that by the terms of the towage contract the owners of the ship agreed to pay for any damage to any of the P.L.A.'s property (including the tug or tugs engaged in such towage or transport) occurring in the course of or in connection with the towage or transport which might arise from collision—whether such collision was caused or contributed to by the negligence of any officers of the Port Authority.

The first point made on behalf of the ship was that the P.L.A. could not claim the benefit of the protection and indemnity terms in the towage contract because at the time of the accident these terms had not come into operation. The point arises by reason of cl. 1 of the towage terms, which is as follows : " For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped." It was argued by Mr. Hayward, on behalf of the ship, that admittedly the tow rope had not been passed to the *Beam* at the time of the collision and therefore the towage had not commenced, and that the protection and indemnity terms only apply to a collision occurring in the course of the towage.

It was admitted on behalf of the P.L.A. that this contention would be sound if the towage was to be done by the *Beam* alone, but Mr. Willmer argued that in this case the towage was to be done by two tugs, and that the towage commenced

when one of the two tugs, namely the *Sirdar*, had started towing. Clause 1, to which I have referred, says that the towage must be deemed to have commenced when the tow rope has been passed to the tug. But in this case the contract is for towage by *two* tugs. In such a case does the expression "the tug" mean "each of the two tugs" or does it mean "either of the two tugs"? The terms, taken as a whole, appear to contemplate the engagement of two tugs. The view that the words "the tug" in cl. 1 mean "each of the two tugs" in this case is borne out by cl. 2. Clause 2 says that during the towage the masters and crews of the tugs shall cease to be under the control of the Port Authority and shall become subject in all things to the orders and control of the master of the ship. But if the towage starts when one of the two tugs makes fast, how can the second tug be under the control of the master of the tow if that tug is at the other end of the dock and is making her way to the ship to be towed?

Again, cl. 4, which is the protection clause, refers to the owner of the ship so being towed paying for damage to any of the P.L.A.'s property (including the tug or tugs engaged in such towage). Here again I think this clause contemplates that the towage by the two tugs shall have started, namely, that the tow rope has been passed to each of the two tugs. It is to be noticed that the owners of the *Clan Colquhoun* asked the P.L.A. to supply two tugs to tow the ship on the terms and conditions endorsed hereon. If the owners of the ship consider that two tugs are needed for the task, it seems unreasonable to hold the ship liable for damage done through the negligence of the P.L.A.'s servants when only one tug is fast and towing. On the other hand, if cl. 1 of the terms should be read in this case to mean: "The towage or transport shall be deemed to have commenced when the tow rope has been passed to or by either of the two tugs," then the plaintiffs are in this difficulty. At the time of this accident only the *Sirdar* was towing ahead, and the damage to the *Beam* did not occur in connection with the towage by the *Sirdar*. In a case of this kind I think the Court ought not to interpret the clause in question in such a way as to entitle the P.L.A. to

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recover from the ship in respect of damage to their property through the negligence of the Authority's servants, if any other reasonable interpretation can fairly be given to the clause in question. If the P.L.A. wishes to impose terms on the owners of the tow which entitles the Authority to recover damage done to their property through the negligence of their own servants, from the owner of the tow, I think that the terms must be perfectly clear as to their meaning.

In my view cl. 1 can fairly be interpreted as meaning that the towage shall be deemed to have commenced when the tow rope or ropes have been passed to each of the two tugs asked for by the ship owner. Until this has been accomplished the ordinary provision of the common law applies to the rights and duties of each party.

I therefore hold that the terms and conditions in this case do not entitle the plaintiffs to recover their damage and do not protect them from liability for negligence of their servants in charge of the *Beam*.

Having regard to the view I have already expressed as to cl. 1, it is not necessary for me to decide the point as to the manning of the tug, but my finding of fact may be desirable on this point, in case I am wrong in law as to cl. 1, and I therefore give it. By the terms of the contract of towage, to which I have referred, there was a proviso to the following effect: "Provided always that such (collision) has not resulted from any breach by the Port Authority of the obligations referred to in cl. 3, hereof, but the burden of proof of any such breach shall be upon the owners of the ship so being towed." The operative part of cl. 3, so far as this case is concerned, is in the following terms: "The Port Authority shall be bound before and at the beginning of the towage to exercise due diligence properly to man the tug." It is to be noted that the burden of proving that the tug was improperly manned is on the shipowners. The defendants' contention on this part was that the tug at the time in question was in command of Porter, who was a deck hand. Porter was called before me as a witness and he appeared, in himself, to be quite a competent man. He has been about

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16 years in the service of the P.L.A., and has been employed in tugs all that time. Before this accident he had frequently assisted the regular tug master in berthing and unberthing ships, and the master in 1933 reported to the P.L.A. that Porter was fit to take command in an emergency in the following terms: "In answer to your memorandum re A. Porter, deckhand, I am now satisfied that he could take charge in case of emergency." Porter did, in fact, take command of the tug on one occasion when the master was away, and on that occasion one of the ships which he assisted, struck the dock wall. The pilot of the ship complained to a P.L.A. official that the collision was due to the fault of the tug. Porter said it was not his fault, and there the matter ended so far as the evidence before me went. Porter admitted that he had never before manœuvred the tug when making fast to a twin screw vessel.

In my view the defendants have failed to discharge the burden of proving that the tug was not properly manned, in that Porter was incompetent to act as master of the *Beam*. Porter had taken charge of the tug because the regular master had been taken ill the day before. Porter knew the locality and knew the tug, and the kind of work she had to do, and the P.L.A. had no reason to think that he was unfit to be in charge of the tug. The accident on this occasion was due to the fact that he was not aware that the ship was a twin screw ship. I think that he, and through him the P.L.A., were to blame for his handling of the tug, which was due to this lack of knowledge on his part, but apart from that I do not find that he handled the tug in such a way as to show that he was unfit to be her master.

I pronounce judgment for the defendants on the claim and counterclaim, with costs.

Solicitor for the plaintiffs: *J. D. Ritchie.*

Solicitors for the defendants: *Coward, Chance & Co.*

E. C. M. T.

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Feb. 24;
March 2.

In the Estate of MABEL AMY LONG (DECEASED).

Probate—Practice—Will entirely holograph—Evidence of completion of will before execution—Bequests "underneath" or "following" signature—Proof of sequence in which several parts of will have been written—Wills Act Amendment Act, 1852 (15 *Vict. c.* 24), *s.* 1.

A holograph will contained on one page a list of bequests; on another page appeared the heading of a will together with the appointment of an executor. Below this was an attestation clause with the signatures of the testatrix and attesting witnesses. There was evidence that the whole will was written before the execution, but there was nothing on the face of the page containing bequests to show that the words of the final bequest were the concluding words of the will. On the question whether the whole of the will or only the page containing the appointment of the executor received the protection of the Wills Act Amendment Act, 1852, s. 1, and whether the bequests were disentitled to probate by reason of their being "underneath or following" the signature, within the meaning of the exception in the closing words of the section:—

Held, distinguishing cases previously decided on those words, which were cases of the use of will forms, that, if the Court is satisfied that the whole will was written before execution and that the dispositive part of it may fairly be read as leading up to the execution and in no sense as a mere annexe or schedule to the will, it would be transgressing the spirit of the statute to insist as a criterion of valid execution upon proof that the several parts of the will were actually written in any particular sequence.

MOTION for admission to probate of testamentary documents.

The testatrix, Mabel Amy Long, died on October 24, 1935, a spinster without any known relation. There were three documents in question dated respectively (1.) February 27, (2.) March 25, and (3.) September 2, 1935. All three documents were holograph and purported to be duly executed and attested. The first document contained certain bequests and a residuary gift and appointed as executor one Ernest Fulk. It was written on one sheet of paper. One side of the paper contained the appointment of the executor and the signatures of the testatrix and attesting witnesses and the other side the dispositions. The second document was in the nature of a codicil. It substituted the present applicant for Fulk as executor, if the latter was unable to act, and bequeathed the

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applicant a legacy. No question arose as to the due execution of this document. The third document presented the same arrangement of its contents as the first and had substantially the same effect. The applicant, John Edward Johnson, was appointed executor by this document and received a legacy. Minor differences between the first and third documents are dealt with in the judgment. There was evidence that all three documents were written before their respective execution, but not of the sequence in which the pages of the first and third documents were written.

The applicant moved for a grant of probate of the last will of September 2, 1935, or in the alternative for the page of that will containing the appointment of the executor and the signatures to the will of the testatrix and attesting witnesses together with the previous documents as together constituting the will.

Clifford Mortimer for the applicant. This case comes within the Wills Act Amendment Act, 1852 (15 Vict. c. 24), s. 1. If the Court can reasonably conclude that, when the testatrix wrote the will she started with the dispositions, and they were already there at the time of execution, the mere fact of the appointment of the executor and the signatures and the attestation clause being on another side of the will does not impede the conclusion which of two sides of a piece of paper is the first and which the last. In this case the page containing the dispositions should be regarded as the first page. In *In the Goods of Sarah Kimpton* (1) Lord Penzance (then Sir J. P. Wilde) said: "I am inclined to say that where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think from the case of *Martha Peach, deceased* (2) that the late Sir C. Cresswell was inclined so to hold, though it does not appear that that case was brought to a final decision." In *In the Goods of Wotton* (3), where the

(1) (1864) 3 Sw. & Tr. 427.
(2) (1858) 1 Sw. & Tr. 138.
(3) (1874) L. R. 3 P. & M. 159, 161.

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same point arose, Sir J. Hannen said: "Nothing can be more general than the language used in the statute 15 Vict. c. 24, which was passed to cure the miscarriages which had occurred under the previous Act (the Wills Act, 1837). . . . . Now, of course, if in this case the whole will were to be treated as following the attestation clause, the application must fail. . . . . Substantially the whole will is written on the second and third sides of the sheet of foolscap; the attestation is on what, under ordinary circumstances, would be called the first side . . . . the true way to look at the transaction seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and second pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed."

[He also referred to *Royle* v. *Harris* (1); *In the Goods of Rebecca Susan Gilbert* (2); and *In the Goods of Mary Moorhouse Smith.* (3)]

C. R. R. Romer for charities supported the argument for the applicant.

F. L. C. Hodson for the Treasury Solicitor. From the position of the writing, the obvious inference of fact is that the testatrix executed the documents before writing anything dispositive. The bequest to "my Executor", naming him, also suggests that his appointment as executor has preceded the bequests.

Cur. adv. vult.

1936. March 2. THE PRESIDENT (SIR BOYD MERRIMAN). This is a motion to propound one or more of three documents as the last will of Mabel Amy Long. The testatrix died on October 24, 1935. The three documents are dated February 27, March 25, and September 2 respectively, in 1935. All three documents are holograph. They show plainly, and this is

(1) [1895] P. 163. (2) (1898) 78 L. T. 762.
(3) [1931] P. 225.

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confirmed by the unchallenged evidence in support of the motion, that the testatrix had a very clear idea of what she wished to do and why she wished to do it. No one looking at these documents can have any doubt, nor is it suggested that there is any doubt, that they were intended respectively to express, and do express, the last wishes of the testatrix. The sole question is whether they, or any of them, are so executed as to effect her manifest purpose.

It is undisputed that the will of March 25, 1935, the second in date, is validly executed. But this will merely names a new executor, in case the executor named in the first will is unable to act; and, beyond bequeathing 10*l.* for the service rendered, it contains no testamentary dispositions.

Counsel for the applicant was inclined to argue that the reference in the will of March 25 to the earlier will of February 27 might cure any defect in the execution of that will by incorporating it in the second will, the due execution of which was not impeached. He recognized, however, that this submission did not touch the real difficulty in this case, which, it will appear, is to decide how much of the earliest will is validly executed. The point is whether the whole of either the first or the third will, or only part of such will, can be admitted to probate. The only practical differences between the first and third wills are that by the third will the executor substituted by the second will in place of the executor named in the first will (who in fact had died before the execution of the third will) receives 20*l.* instead of 10*l.*, while certain of the legatees who are identical in both wills receive 10*l.* instead of 20*l.* The earliest and the latest wills have the following features in common: Both are written on one sheet of paper; in both the whole of one side of the paper is occupied with the specific legacies beginning in each case with the words "I give and bequeath to my dear friends the following sum", etc., and ending in each case with the following words: "The Residue to be divided between Lord Mayor Treloar's Cripple Hospital, Alton, Hampshire, and Dr. Barnardo's Home." In neither case is there any mark on the paper to indicate that the words last quoted are the

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concluding words of the will. In both cases part of the other side of the paper contains the words " This is the last Will and Testament of Mabel Amy Long " followed by the appointment of the executor. In each case after the appointment of the executor a line is drawn across the paper, indicating finality, and in each case this is followed by the attestation clause, with the signature of the testatrix and the signatures and addresses of the two witnesses, who in fact were the witnesses to all three documents. There is one other common feature, on which stress is laid by counsel for the Treasury—namely, that the wording of the bequest to the executor reads " to my executor," naming him, " 10*l.*" or " 20*l.*" as the case may be, and this may appear to suggest that the appointment of the executor has already preceded the bequests. On the other hand, there are the following distinctions between the two documents. The first will is written on the severed half of a law stationer's sheet for Probate engrossment. The third will is written on a piece of notepaper. In the first will the bequests and the appointment of the executor followed by the signatures both read from the top to the bottom of the sheet. In the third will the bequests run from the top to the bottom of the sheet opened lengthways, that is to say, above and below the fold ordinarily found in a sheet of notepaper, while the appointment of the executor and the signatures run from the top to the bottom of one side of the notepaper as normally folded. In the case of the third will there is no space after the attestation clause for anything else to be written across the whole width of the page. In the case of the first will the last fold of the sheet, nearly a quarter of the whole below the attestation clause, is left vacant. With regard to the first will the attesting witness, Rose Norton, in her affidavit says : " The will was on a piece of paper the size of foolscap, and she told us that her will was on one side. She then signed her name on the other side of the paper and showed us where to sign our names as witnesses " etc. With regard to the third will, the same witness says : " The said will was written on a sheet of notepaper which was folded and I noticed at the time

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when the testatrix unfolded the paper that the other side of the sheet to which we put our names had been written on. She told us that the document was her will and that her gifts were set out on the other side. She signed the will in our presence and then asked us to sign it as witnesses" etc. The other witness, who was deaf, was not quite so explicit; but I have no doubt whatever from an inspection of each document separately, and, in particular, on a comparison of the two documents, that in each case the side containing the bequests was written at the same time as the other side and, therefore, that the writing which was seen by the witness on the latest will is that which is now before me. The question for decision is whether the whole or either of these documents is executed in accordance with the Wills Act Amendment Act, 1852, s. 1. It is not disputed that the saving provision of the Act covers the appointment of the executor in each case, but it is suggested that the execution is not in accordance with the statute as regards the bequests, and that an intestacy, therefore, results. Counsel for the executor, the applicant, argues that the execution comes within the words of the section: "Every Will shall, so far only as regards the position of the signature of the testator, be deemed to be valid . . . . if the signature shall be so placed, at or after, or following . . . . or opposite to the end of the Will that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such Will shall be affected by the circumstance . . . . that the signature shall be on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature . . . ." and while invoking the words "the enumeration of the above circumstances shall not restrict the generality of the above enactment" counsel argues that in neither case are the bequests inoperative by reason of being "underneath" or "following" the signature within the exception of the closing words of the section. But I am quite clear (indeed counsel for the Treasury does not argue the contrary) that

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the bequests are not underneath the signature. Indeed, though in one case there is ample room for several lines of the bequest to follow the signature, they are, as I have already said, in each case on the other side of the paper.

The question whether they "follow" the signature is more difficult. This case is not exactly covered by any of the cases which have been decided on these words. I can dismiss the case of *Royle* v. *Harris* (1), which seems to me to turn on the fact that the first page of a lithograph form, at the bottom of which was the signature of the testatrix and the attesting witnesses, contained a bequest to "my sister and friends" and that this imperfect bequest was expanded on the following page. *In the Goods of Wotton* (2), also the case of a lithograph form, differs from the present case, inasmuch as some form of opening words which, it may be presumed, appeared on the first page were ignored and the disposing part was written on the second and third blank sides, beginning with the words, written by the testatrix: "This is the last will and testament" etc. It does resemble this case so far that Sir James Hannen relied on the evidence of witnesses that the whole document was written before the execution by the testatrix. *In the Goods of Rebecca Susan Gilbert* (3), also a case of a printed form in which, unlike the case of *Wotton* (2), the first page was filled up with a bequest to a beneficiary, and like that case, with the appointment of an executor, Sir Francis Jeune, as he then was, held that the second and third pages containing various bequests did not follow the signature, upon evidence that their contents had been written before the signatures of the first page. In *In the Goods of Mary Moorhouse Smith* (4), which again was a case of a printed form, the front page containing the words "This is the last will" was filled in with the names of executors and directions as to the place of burial, but contained no disposition of property and was duly executed. The matter was complicated by the fact that the testatrix herself had marked the page which was duly executed as

(1) [1895] P. 163.
(2) L. R. 3 P. & M. 159.
(3) 78 L. T. 762.
(4) [1931] P. 225.

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page 1, and those on which the bequests occurred as pages 2 and 3 respectively. There was evidence that the testatrix had written the words of page 3 before she executed the will on page 1. Bateson J. on an inspection of the will appears to have come to the conclusion that she actually wrote pages 2 and 3 before she wrote page 1. He came to the conclusion that the proper way to read the document was by beginning on what was called page 2 and ending with the signatures. He recognized that this would bring the words " This is the last will and testament " into the middle of the will, but held that there was no magic in these words.

As I have already said, there is evidence which completely satisfies me that the side of the page containing the bequests in each case was written in its present form before the signatures of the testatrix and witnesses were made. There is some evidence, of which not the least important is the drawing of the final line above the signatures and the absence of any such line after the bequests, from which it may be inferred that the page containing the bequests in each case, was written before the page containing the execution ; but it is impossible to be certain about this. In my opinion this is not essential. Provided that the Court is satisfied that the whole document was written before the signatures were made, and that the dispositive part of the document may be fairly read as preceding and leading up to the part containing the signatures, and in no sense as a mere annexe or schedule thereto, I think that it would be transgressing what Sir James Hannen in *In the Goods of Wotton* (1) called " the spirit of the Act " to insist, as a criterion of valid execution, upon proof that the several parts of the document were actually written in any particular order.

In this case, as in the case of *Smith* (2), I am satisfied that the proper way to read both the earliest and the latest wills is to begin with the words " I give and bequeath " and to end with the signatures. As the will of September 2, 1935, is complete in itself, and therefore revokes the earlier wills, I direct that this will be admitted to probate. I think that

(1) (1874) L. R. 3 P. & M. 159, 161. (2) [1931] P. 225.

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it was proper that both the Treasury and the charities named should be represented, and they will have their costs of the motion out of the estate.

Solicitors: *Rawlinson & Son; Hyde, Mahon & Pascall; Treasury Solicitor.*

R. M. M.

1936
June 11.

THE CORNISH ROSE.

Shipping—Salvage—Facts in statement of claim admitted—Inferences not admitted—Admission of documentary evidence in support of or against inferences—Practice to be followed.

In a salvage case in which the defendants admit the facts in the statement of claim but not the inferences sought to be drawn therefrom, the practice is that witnesses should not be called to attempt to prove facts beyond those admitted; but documents such as the defendants' logs, which the plaintiffs allege tend to support inferences in dispute upon the pleadings, cannot be excluded.

It is desirable, however, that notice should be given to the other side of the intention to tender the documents so that they may be prepared with any other admissible document directed to the same issue—namely, the proper inference to be drawn from the admitted facts.

ACTION OF SALVAGE.

The plaintiffs were the owners, master and crew of the steamship *Finland*; the defendants were the owners of the steamship *Cornish Rose*, her cargo and freight.

The *Cornish Rose*, a vessel of 471 tons gross, had broken down off the Cornish coast in bad weather; her steering-gear was damaged and with water in her engine-room she was unable to use her pumps or engines. The *Finland*, a vessel of 1333 tons gross, saw her signals of distress and came to her assistance. With some difficulty she made fast and eventually towed the *Cornish Rose* into Mounts Bay.

The plaintiffs set out the facts of the service very fully in their statement of claim and alleged (inter alia) that but for their services the *Cornish Rose* must inevitably have been

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driven sooner or later on to the rocky and dangerous coast of Cornwall, in which case she would almost certainly have become a total loss.

By their defence, the defendants admitted the facts alleged in the statement of claim but not the inference sought to be drawn therefrom.

H. G. Willmer for the plaintiffs.

E. W. Brightman for the defendants.

The case was tried without witnesses (or their statements) on either side. In the course of the arguments the question arose whether, having regard to the admissions in the defence, the plaintiffs were entitled to put in the defendants' log, and *The Buteshire* (1) and *The Woodarra* (2) were referred to. In the former case, in which the defendants admitted the facts but not the inferences and submitted to the judgment of the Court thereon, Bargrave Deane J. refused leave to put in the defendants' log on the ground that it was contrary to the practice to allow further evidence to be given of the salvage operations, the only question for the Court being the inferences to be drawn from the admitted facts. In *The Woodarra* (2), where the defendants admitted the facts, but denied that the inferences were accurate or well-founded or that the vessel was ever in real danger, Hill J. allowed the log to be put in.

In the present case, counsel for the defendants not objecting to the log being put in provided that the defendants were also allowed to put in other logs from the Lizard and Land's End lighthouses, the Court allowed all three logs to be put in evidence. The case, however, is reported by reason of the President's observations at the conclusion of his judgment on the practice to be followed in similar cases.

THE PRESIDENT (SIR BOYD MERRIMAN). This case has been put before me with the maximum of agreement on both sides and in a very convenient and helpful way. That being

(1) [1909] P. 170, 174.
(2) [1921] W. N. 359; 38 Times L. R. 160.

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THE CORNISH ROSE.

The President.

so I am relieved from going into any elaborate review of the facts. On a dark stormy December night the *Cornish Rose* was in considerable danger somewhere between fifteen to twenty miles north-west of Pendeen, at a time when there was a strong north-west wind blowing, and her engines had completely broken down. She could neither steer herself nor, of course, could she steam at all; she was shipping considerable quantities of water and was in danger at any time of a further breakdown of hatches and of becoming helpless. Of all that there is no dispute. Although it may be possible to exaggerate the danger to her, no one suggests she was not in considerable danger. On the other hand she was in a part of the sea where there were in fact other ships which could have rendered assistance, and one at least which appears to have been ready and willing to do so in addition to the *Finland*. But it was the *Finland* which rendered the services and brought the *Cornish Rose* into safety after some twenty-two hours of considerably hard work. In the course of that time one tow-rope or another parted three times. To a large extent, in one instance if not in two, that was due to the condition of things on the *Cornish Rose*, and to their failure to take the necessary steps to make the connection in a seamanlike way. Taking one thing with another, there is no doubt it was a laborious, rather dangerous, and meritorious service. The agreed value of the ship and cargo was 3480*l.*, in round figures 3500*l.* The *Finland* was a much more valuable ship and she incurred certain expenses, rather less than 50*l.*, and a certain loss of time. I think, taking a broad view and calculating the expenses she has incurred, that if I award 1000*l.* in all for this service I shall not be far wrong. No apportionment is required as between the owners and master and crew and therefore I make none.

Before parting with the case I want to say one other thing. This is a case in which a very full and careful pleading of the facts upon which the claim was based has been accepted by the defendants as an accurate statement of the facts, though, following the common form of pleading in these matters, the defendants have not accepted all the inferences

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as to the danger, the value of the service, and so forth which it is sought by the plaintiffs' statement of claim to draw from the facts which were admitted. In these circumstances the plaintiffs sought to use the defendants' log in support, not of any new allegation of fact, but of the inferences which they desired to draw as to the nature of the services.

There was no objection to the use of this log provided that on the other side the inference from the absence of any mention in the log of the possibility of help from other ships was counteracted by corresponding entries from the logs of the Lizard and Land's End lighthouses. I have admitted all these documents, the latter logs not having been objected to by the plaintiffs.

But I think it is desirable to say a word about the matter, as the question of practice is of some importance. I consider it is very important to maintain the practice that when pleadings are framed in this way with the deliberate intention of narrowing the contest and obviating the necessity of calling expensive witnesses—a practice which is very much to be encouraged—no witnesses should be called either to prove facts that are already admitted or to attempt to prove facts beyond those which have been pleaded and admitted—in other words, to give evidence of some new departure from the pleadings. But it must be remembered that upon this form of pleadings where the inferences from the facts are contested there is still some contest on the pleadings themselves, and I think it is impossible to exclude such a document as the defendants' own log if it is alleged that there is an entry in the log which tends to support inferences as to the nature of the services or the danger to the salved vessel, which inferences are disputed upon the pleadings. I think that view is in accordance with the decision of the late Hill J. in *The Woodarra* (1), to which my attention was called, nor do I think that decision conflicts in any way with the practice which was accepted as being the practice in *The Buteshire*. (2) I think it is only necessary to add

(1) [1921] W. N. 359; 38 Times L. R. 160.
(2) [1909] P. 170, 174.

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that if it is desired in a proper case to use such a document as the defendants' log, notice should be given to the other side of the intention to tender the document in evidence so that they may be prepared with any other admissible document directed to the same issue—namely, the proper inference to be drawn from the admitted facts. In that way I cannot see that any real inconvenience will result from admitting documents, directed to the dispute as to the proper inference from the facts, which may be helpful in elucidating that particular matter of contest.

In this case it was unnecessary to insist upon any formalities of that sort, because both sides were ready with the documents and were willing to admit them; but I think it well to emphasize that in any case in which it is intended to depart from the accepted practice of allowing the pleadings to stand by themselves and to call attention to any document of the sort indicated, it is desirable that notice should be given in advance to the other side.

There will be judgment for 1000*l.* and costs.

Solicitors for the plaintiffs: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the defendants: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

E. C. M. T.

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May 5.

BINNEY *v.* BINNEY AND HILL.

Divorce—Delay of Petitioner in suing—Nature of delay—Culpable acquiescence showing insensibility to loss of spouse—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *sub-s.* 3, (*a*), *re-enacting the Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

A husband petitioner for divorce separated from his wife about eighteen years after their marriage because of her association with the co-respondent, with whom she cohabited in adultery for about twenty years. The husband was willing to take proceedings for a divorce, but the respondent and co-respondent desired their relations not to be made public and the husband was indifferent and no step was taken. Thereafter the husband

maintained an adulterous connection with another woman for many years. He had since separated from this woman, but having about thirty-eight years after his marriage met another woman whom he desired to marry he now presented the present petition for the dissolution of his existing marriage. The Court, construing delay within the meaning of the statute to be culpable delay in the nature of acquiescence, held the facts of the case to amount to culpable delay, and dismissed the petition.

PETITION for dissolution of marriage.

The petition was that of the husband and undefended. The question arose for the decision of the Court whether the petitioner was guilty of unreasonable delay in presenting the petition within the meaning of the statute.

The marriage took place in 1896. There were two children. About eighteen years later the parties separated according to the case of the petitioner on account of the association of the respondent with the co-respondent. The petitioner and respondent were now sixty-four and sixty-one respectively, and the petitioner admitted his indifference at the time of the separation. The respondent having left the petitioner, habitually cohabited with the co-respondent, living happily with him till and after the filing of the petition. The petitioner was willing to take proceedings, but the respondent and the co-respondent desired the matter to be kept quiet and no step was taken. In 1914 the petitioner himself commenced an adulterous connection with a woman with whom he regularly cohabited till in 1923 he finally terminated the relationship, because, as he stated in evidence, the woman in question became addicted to habits of intemperance. From 1923 onwards till the filing of the petition in 1935 the petitioner still took no step to obtain a dissolution of his marriage or to enable himself to contract a second marriage. In 1934 he met a woman with whom his relations were those of innocent friendship. Having consulted solicitors, he then filed the present petition. He gave evidence to the effect that he now desired to marry the woman in question, and he included an averment to that effect in his discretion statement. There was also evidence that the respondent had expressed a desire to enter the married state with the co-respondent.

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Evidence was called in proof of the adultery of the respondent and co-respondent.

Clifford Mortimer for the petitioner. There is no reported case for many years of a petition being rejected on the ground of unreasonable delay. The section (178) of the Judicature (Consolidation) Act, 1925, re-enacting the Matrimonial Causes Act, 1857, s. 31, and perpetuating the suspicion with which the Ecclesiastical Courts looked upon delay by a husband in enforcing his rights, gives the Court power in such a case to refuse a decree; but in practice the delay must be of a culpable nature to induce the Court to exercise that power. The conduct of the petitioner must amount to acquiescence or something approaching to condonation, and the husband must appear insensible to his loss; *Pellew* v. *Pellew and Berkeley*. (1) In this case it was the wife who broke up the home, and who requested the husband to take no step. Since the older cases on the question were decided the Court has taken an entirely new view as to withholding a decree from a petitioner who is in fault having himself committed adultery. The interests of third parties will now be looked at, even those of the respondent and co-respondent, in considering whether the discretion of the Court to grant a decree shall be exercised. The parties to such a case as the present should be placed in a position enabling them to marry: *Wilson* v. *Wilson*. (2)

BUCKNILL J. [having dealt with the facts and referred to evidence given by the petitioner, who had said that formerly he was under the belief that he could not be a successful petitioner having regard to his own adultery, continued:] I cannot accept the excuse given by the petitioner for his delay up to 1934. The petitioner was an educated man and ought to have known the law. He could easily have found it out, at all events. But there is no reason to believe that up to 1934 the petitioner wanted a divorce. He then met a woman whom he now wants to marry. There is no suggestion of immorality in that. But as he now wishes to marry her he

(1) (1859) 1 Sw. & Tr. 553. (2) [1920] P. 20.

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has taken the advice of his solicitor and has been told that he may get a divorce. The respondent and co-respondent also think that they may as well get married.

The question that I have now to decide is whether in the exercise of my discretion a decree should be granted. The matter is governed by the Judicature (Consolidation) Act, 1925, s. 178 (1), which enacts that the Court shall not be bound to pronounce a decree if it finds that the petitioner has been guilty during the marriage of unreasonable delay in presenting a petition. Has there been unreasonable delay? I understand the statute to mean culpable delay, something in the nature of acquiescence such as shows the petitioner to have been insensible to the loss of his wife. I assume that the purpose of the law in laying down discretionary bars to divorce like delay is to encourage lawful wedlock and to set its face against adultery. The statute accordingly makes it more difficult to obtain a divorce if the petitioner has been guilty of adultery or of culpable delay in suing for divorce. In my view the delay in this case amounts to culpable delay. In effect the petitioner has acquiesced in the adultery of his wife. He took no steps originally to free himself and to let the respondent and co-respondent contract a lawful union. Whatever my personal sympathies may be, they are not a proper ground for exercising a judicial discretion, and as I am satisfied that there has been culpable delay and real acquiescence by the petitioner in the adultery of his wife the petition must be dismissed.

Solicitors: *John Carnegie & Mosely, for Hatwell, Pritchett & Co., Birmingham.*

(1) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178: "(3.) . . . . Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the Court he has been guilty:—

(*a*) of unreasonable delay in presenting or prosecuting the petition . . . ."

R. M. M.

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May 26.

CLIFTON otherwise PACKE *v.* CLIFTON.

Nullity of marriage—Impotence of man respondent—Petition by woman for maintenance—Duration of cohabitation ante litem motam—Covenant of third party to marriage settlement producing settled funds available to ground order for maintenance — Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192 (1).

A marriage was celebrated in June, 1934, and a petition for its annulment on the ground of the impotence of the man was filed by the woman in April, 1935. The respondent did not present himself for medical examination and did not defend the suit and a decree nisi of nullity was pronounced. The petitioner filed a petition for maintenance. Apart from settled funds the means of the respondent in respect of which maintenance could be ordered amounted to about 760*l.* per annum ; the means of the petitioner were about 420*l.* per annum. Further means of the respondent arose under a covenant by a third party to a marriage settlement of the parties to the suit.

The Court, in confirming the report of the Registrar that no case for maintenance was made out, distinguished other cases of nullity in which maintenance had been ordered having regard to the short duration of the cohabitation in the case before it and also on the ground that the third party to the settlement from whose covenant settled funds of the husband proceeded had entered into his covenant in the expectation of a valid marriage being contracted.

Petition for maintenance.

On July 22, 1935, a decree nisi was granted to the petitioner Ursula Sybil Clifton otherwise Packe, annulling a marriage celebrated on June 2, 1934, of the petitioner and Peter Thomas Clifton, the respondent, on the ground of the alleged incapacity of the respondent to consummate the same. The respondent did not submit to inspection or defend the suit. The decree was made absolute on February 3, 1936. On January 3, 1936, the present petition was filed by the petitioner praying for maintenance and security and also for variation of settlement. By an ante-nuptial settlement dated May 29, 1934,

(1) "The Court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any party of the property settled either for the benefit of the children of the marriage or of the parties to the marriage as the Court thinks fit."

the father of the respondent assigned to trustees securities providing an annual payment of 400*l.* to the respondent for life and covenanted to pay a further 400*l.* per annum to the respondent during the joint lives of himself and the respondent. If the petitioner survived the respondent the petitioner took a life interest in the respondent's fund. In addition the respondent had income arising from pay as a military officer and a discretionary trust for his benefit amounting in all to 760*l.* per annum, making the total income of the respondent 1560*l.* gross per annum. The petitioner brought into settlement funds yielding 421*l.* gross per annum on trust for herself for life and subject thereto on protective trusts for the respondent for his life. The Registrar reported on both petitions as follows, that the settlement should be varied by the mutual extinguishment of the interest of either party in the funds of the other and the re-transfer to the parties of their funds. These proposals had the effect of reducing the available means of the respondent against which maintenance could be ordered, if at all, to 760*l.* The proposed report was opposed before the Registrar on behalf of the petitioner on the ground that the two annual payments of 400*l.* each settled by the father of the respondent should remain available for securing maintenance. The Registrar having dealt with the available funds of the parties under the settlement reported that having regard to the period of time during which the marriage had subsisted and the age and position financially and otherwise of the petitioner, no case for maintenance was made out. In addition to the extinction of interests under the settlement he submitted that the respondent should bear the costs of the petition for variation, but that no costs should be taxed against the respondent of the petition for maintenance.

Noel Middleton K.C. for the petitioner. The powers of the Court to grant maintenance apply under the statute to nullity as well as dissolution of marriage, but are exercised on a different basis. In this case the Registrar seems to have thought that the consideration for the marriage having failed the father of the respondent should be relieved of his covenants.

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In *Nepean* v. *Nepean* (1) a similar point arose, and it was held that "property settled" and, therefore, applicable by the Court within the meaning of the statute, included money covenanted to be paid by third parties. In *Gullan* v. *Gullan* (2) the wife was the respondent and had an income of 40*l.* and the husband one of over 1000*l.* The husband after his decree of nullity was ordered to pay the wife 100*l.* per annum during the joint lives and to secure her 50*l.* per annum for her life if surviving. In *Gardner* v. *Gardner* (3) a sum approaching one-fourth of the means of the man was ordered to be paid to the woman who petitioned and had practically no means. Lord Merrivale P. said in that case an application for "permanent maintenance after a decree of nullity is not an appeal to a set of fixed principles but one to the sense of propriety and moral justice of the Court."

As to the suggestion that the consideration for the covenants of the father of the respondent have failed with the marriage, the Act of 1925, s. 192, gives the Court power to deal with settled property and the covenants provide settled property. In applying settled property the Court will not release payment of a covenanted annuity for the benefit of the covenantor —a third party. The income of the petitioner should be made up to 500*l.* per annum by an order for maintenance.

W. N. Stable K.C. (*Hon. Victor Russell* with him) for the respondent. The report should be upheld. The validity of the covenants is conditional upon the validity of the marriage. There has been no marriage and accordingly the liability under the covenants has ceased. It is suggested that the covenants by a third party can be treated as alive as they produce settled property. Whatever authority for this is to be found in *Nepean* v. *Nepean* (1) the Court was relying in that case on *Dormer* v. *Ward* (4) where, however, the covenantor was the husband, and it is laid down by the Court of Appeal that after a marriage has been declared void the condition has not happened on which the covenants can take effect. This petitioner only lived with the respondent for a few months

(1) [1925] P. 97.
(2) [1913] P. 160.
(3) (1920) 36 Times L. R. 294.
(4) [1901] P. 20, 34.

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and seeks to impose upon the father of the respondent a continuing liability for her support, but the father of the respondent only made the provision for his son thinking that the marriage would be a valid one, and in the actual circumstances it would be inequitable to treat his liability as continuing.

Hon. J. T. Roberts for the trustees of the settlement.

BUCKNILL J. This motion comes before the Court under these circumstances. The petitioner went through a ceremony of marriage with the respondent on June 2, 1934, and obtained a decree nisi of nullity of the marriage in July, 1935, just thirteen months after the ceremony. In due course petitions were lodged by her for maintenance, and also asking that the marriage settlement should be varied. The financial position of the parties is this. There was a pre-nuptial settlement under which the respondent's father, Colonel Clifton, entered into a personal covenant to pay 400*l.* per annum to his son, the respondent, during the joint lives of himself and the respondent, and also brought into settlement certain securities which secured the payment of 400*l.* a year to the respondent during his life. In addition to that, the respondent, who is an officer in His Majesty's Army, has pay amounting to about 180*l.* a year, and he has certain rights under a discretionary trust which bring him in 580*l.* a year. That means that, apart from moneys which he receives from his father under the settlement, his income is about 760*l.* a year. The wife, the petitioner, on the other hand has an income of about 420*l.* a year.

When the petition for maintenance came before the Registrar he had also before him the petition for variation of settlement, and as to the latter the learned Registrar reported that the powers and interests of the respondent in the petitioner's fund should be extinguished. The respondent by his answer to the petition for variation of settlement asked that all rights, powers and interests of the petitioner in the respondent's fund should be extinguished. The learned Registrar in his report has recommended that the settlement

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should be varied in the terms of the prayers of the petition and the answer, and he has reported that no maintenance should be ordered as against the respondent, mainly on the ground that if you extinguish the rights that the settlement gives under the covenant of Colonel Clifton, the father, and in respect of the securities which Colonel Clifton brought into the settlement, thereby extinguishing a settlement producing 800*l.* a year, it leaves the parties in this position, that the husband has about 760*l.* a year and the wife about 420*l.*, and under those figures there was no case for maintenance made out. The answer of the wife to that, as I understand it, is this, that this is a case in which maintenance ought to be ordered to the wife, and, if that is right, the Court ought to enforce as against Colonel Clifton powers which the Court has of making him make some provision under his covenants and under this trust, although, apart from the powers of the Court to do that, Colonel Clifton's liabilities are now extinguished, because the marriage has been annulled.

It seems to me that the real question which I have to decide in this case is whether, to quote the words of Lord Merrivale in the case of *Gardner* v. *Gardner* (1) which was cited to me, this is a case in which "the sense of propriety and moral justice of the Court requires" that some provision by way of maintenance should be made to the wife. It is very clear, as stated in the vigorous argument put forward on behalf of the respondent, that Colonel Clifton no doubt made this provision for his son thinking that there was going to be a valid marriage and with the natural hopes that that entails. In fact no valid marriage has been consummated and the ceremony has become null and void. Is there any reason why the wife in this case should receive maintenance at the hands of her husband? The parties were only married for a year and the marriage has been annulled on the ground of the respondent's incapacity. This case seems to me to be entirely different to one of dissolution of marriage where there is a fault on the part of the husband. The cases to

(1) 36 Times L. R. 294, 295.

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which I was referred by counsel for the petitioner are all cases in which quite a substantial period of time had elapsed between the marriage and the decree of nullity. In *Nepean's* case (1) I see it was eight years, and in *Gullan's* case (2) it was ten years, and in *Gardner's* case (3) I see it was eight years.

In this case I cannot see that the Registrar's decision is wrong in any way, nor can I see that the wife has really made out any case of maintenance to be granted to her. I think that the report of the learned Registrar is right both in respect of the petition to vary and the petition for maintenance.

There is just one other point. The registrar has recommended that the wife's costs of the petition for maintenance should not be taxed against the husband. Counsel on behalf of the husband, I think very properly, has consented that the report should be varied in that respect. Therefore, I vary the report by ordering that the petitioner's costs should be taxed against the husband, both before the learned registrar and on this motion.

Solicitors: *Withers & Co.; Dawson & Co.; Norton, Rose & Co.*

R. M. M.

W—— (M. J.) *v.* W—— (H. R. W.).

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June 16, 26.

Divorce—Practice—Wife's petition — Named woman charged with adultery with husband—Party to suit—Intervention—Right of "any person"—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 7—*Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 3—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 177, *sub-s.* 2; 183, *sub-s.* 2; 197, 225—*Matrimonial Causes Rules*, 1924, *rr.* 17, 18, 19.

The woman named in a petition by a wife as having committed adultery with the husband was served with the petition with the usual notice to apply for leave to appear and intervene. She did not

(1) [1925] P. 97. (2) [1913] P. 160.

(3) 36 Times L. R. 294.

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enter an appearance or apply for leave. The husband appeared but filed no answer. A decree was pronounced, but according to the practice named no woman. Six months elapsed and the petitioner took no step to make the decree absolute, but eight months after decree nisi the woman named appeared as a member of the public pursuant to s. 183, sub-s. 2, of the Judicature (Consolidation) Act, 1925 (1), to show cause against the decree absolute. She filed an affidavit the gist of which was an allegation of collusion between the husband and the wife and a denial of adultery. The parties to the suit traversed these allegations. On a summons to strike out her appearance raising the question whether she came within the description of "any person" in the Act of 1925, s. 183, sub-s. 2, because she had been named in and served with the petition, and on a comparison of the authorities in which it was held that the right of intervention was not open to the parties to the suit, and on consideration of the material sections of the Act of 1925, replacing the former legislation:—

Held, that mere service of the petition upon her did not make her a party to the suit; but that as proceedings for divorce and the nature of the evidence adduced were not matters of personal litigation merely but also of public interest, intervention after decree nisi was a statutory right in the public interest, and that until it was exercised the woman named continued to have the character of "any person" within the meaning of the section and could obtain leave to intervene. When she had done so her right under the section disappeared, because she had then by exercising her right of intervention become a party to the suit.

THE petitioner filed her petition dated February 6, 1935, praying for dissolution of her marriage with the respondent on the ground of his adultery with one A. B. on November 20–24, 1934, at an hotel.

The petition proceeded upon a letter written by the respondent to the petitioner dated November 30, 1934, enclosing an hotel bill. In answer to inquiry by the petitioner's solicitor the respondent's solicitor had furnished the name and address of the woman named in the petition and stated

(1) Judicature (Consolidation) Act, 1925, s. 183, sub-s. 2: "After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, shew cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

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that the respondent and the woman had stayed at the hotel. By arrangement the respondent and the woman were served with the petition at the office of the solicitor of the respondent on February 14, 1935. Neither of them appeared, and a decree nisi was pronounced on June 27, 1935. This decree had not been made absolute. On February 22, 1936, an appearance in the suit was entered by A. B. intervening to show cause against the making of a decree absolute. A summons returnable before a judge in Chambers was issued on April 21, 1936, at the instance of A. B. for an order for directions on the issues raised by her intervention. On this summons coming on on May 4, 1936, it was adjourned by the direction of the judge for fourteen days for the respondent to be served. On May 18, 1936, another summons was issued by the respondent to strike out the appearance entered by A. B. On May 21, 1936, this summons was adjourned into Court for argument.

The case for the intervener on the affidavits was that she had had no intercourse with the respondent at the hotel and had gone there in a false name by a collusive arrangement with the respondent to enable his wife to obtain a divorce, and she was corroborated as to the alleged collusion by her sister. The petitioner and the respondent filed affidavits denying collusion.

The King's Proctor had been communicated with at the instance of the intervener, but had declined to interfere.

Noel Middleton K.C. (*Clifford Mortimer* with him) for the petitioner. The appearance should be struck out. The intervener might have applied to be made a respondent under s. 177, sub-s. 2, of the Act of 1925, replacing s. 28 of the Act of 1857. The object of the legislation is that the man charged with adultery with the wife must be and the woman charged with adultery with the husband may be made a respondent. The Act of 1857, however, went no further as to parties and a person in the position of the intervener had no locus standi as of right: *Y.* v. *Y.* (1) The result of that

(1) (1860) 1 Sw. & Tr. 598.

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decision was the passing of the Act of 1860, s. 7, giving to "any person" the right of intervention to show cause against a decree absolute. It was nevertheless held in *Stoate* v. *Stoate* (1) that a respondent wife who had appeared had no right to intervene as "any person" even after the passing of that Act, and that her proper course was to apply for a new trial. In *Boulton* v. *Boulton and Page* (2) no doubt the respondent wife who had not appeared was allowed to show cause against a decree absolute pending inquiry into counter-charges against the husband, but the non-appearance of the wife was due to misapprehension. In *Pattenden* v. *Pattenden and Herzfield* (3) it was held that in such a case the proper course was to apply for a new trial. In *Harries* v. *Harries and Gregory* (4) a co-respondent who had been found guilty was not allowed to intervene as a member of the public, i.e., as "any person." In *Clements* v. *Clements and Thomas* (5), neither of the respondents having appeared and a decree nisi having been pronounced, doubt was expressed whether the intervention of a third party at the instance of the respondents could be permitted. In *Howarth* v. *Howarth* (6) Lindley L.J. held that "any person" does not include a respondent who has other means of applying to the Court than by availing himself of the right to intervene. In *French* v. *French* (7) Sir Samuel Evans P., while allowing a woman named to intervene under s. 3 of the Act of 1907, did so because she had received no notice of the proceedings, and that is consistent with her having no locus standi as member of the public, i.e., as "any person." By r. 17 of the Matrimonial Causes Rules, 1924, the woman named has to be served with notice of the proceedings with an intimation that she may apply for leave to intervene within eight days, which is consistent with prompt appearance. Moreover if the interpretation section (225) of the Act of 1925 applies she becomes a party by being served

(1) (1861) 2 Sw. & Tr. 384.
(2) (1861) 2 Sw. & Tr. 405.
(3) (1869) 19 L. T. 612.
(4) (1902) 86 L. T. 262.
(5) (1864) 3 Sw. & Tr. 394.
(6) (1884) 9 P. D. 218, 228.
(7) (1914) 30 Times L. R. 584.

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with notice. [He also referred to *Wheeler* v. *Wheeler and Rhodes* (1); *Grieve* v. *Grieve* (2); *Harrop* v. *Harrop* (3); and *Lowe* v. *Lowe*. (4).] It was with the object of meeting these cases that the Act of 1907 was passed (now represented by s. 197 of the Act of 1925), the wording of which gives rise to the view that "any person" does not include an existing respondent nor, as we submit, a woman named. In this case the applicant did not ask for leave to intervene under the last mentioned section but merely as a member of the public or "any person" under s. 183, sub-s. 2. She has already applied to the King's Proctor, who has refused to intervene. In the meantime a decree nisi has been pronounced and she can only apply for a new trial.

J. F. Compton Miller (*Walter Frampton* with him) for the petitioner. We adopt the argument for the respondent. The petitioner is now desirous that the decree nisi should be made absolute without delay.

S. Parnell Kerr for the woman named. "Any person" in the interpretation section (225) of the Act of 1925 is to be construed in its literal everyday sense: *Lumsden* v. *Inland Revenue Commissioners* (5); *Chorlton* v. *Lings*. (6) A woman named has the right to become a party if she desires, but if she does not appear she has no locus standi as a party. Sect. 225 will not then make her a party. A woman named is not in the same category as the respondent or the co-respondent, who are necessarily original parties to a suit. In the other cases, e.g. *Howarth* v. *Howarth* (7), the expression "any person" did not receive due attention in argument and it was wrongly assumed that it excluded the respondent and the co-respondent. If, however, that was the proper construction of it the exclusion should not be extended to a woman named. When the status of marriage is in question it is not merely a question of private right, the public interest is involved.

(1) (1889) 14 P. D. 154.
(2) [1893] P. 288.
(3) [1899] P. 61, 64.
(4) [1899] P. 204, 209.
(5) [1914] A. C. 877, 892.
(6) (1868) L. R. 4 C. P. 374, 392.
(7) (1884) 30 Times L. R. 584.

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In *Sloggett* v. *Sloggett* (1) it was said by Lord Merrivale P.: "Contrary to the ordinary course of trial of civil proceedings the Court is required not only to deal with issues raised by the parties, but with independent matters deemed by the legislature fit to be dealt with in respect of a larger interest, that namely of the community." In that case the right of the King's Proctor to intervene before decree nisi was the subject of the discussion, while in *Bowen* v. *Bowen and Evans* (2) it was made clear that intervention should be allowed up to the last moment before decree absolute. In the comparatively recent case of *Stuart* v. *Stuart and Holden* (3) an appearance by a member of the public to show cause against the decree absolute was entertained six months after the decree nisi. In *St. Paul* v. *St. Paul and Farquhar* (4) Lord Penzance upheld the practice of the respondent and co-respondent giving to the King's Proctor information adversely to the petitioner after decree nisi. The inference justifies the course of the woman named in the present case.

Noel Middleton K.C. in reply. The Court is asked to reopen matters which were within the knowledge of the intervener at the date of the decree nisi. She neglected the proper machinery for intervention as a party when she had the opportunity. It is not the proper policy of the Court to allow her to intervene as a member of the public at this late stage.

Cur. adv. vult.

June 26. BUCKNILL J. In this matter the question which the Court has to decide is whether a woman whom the petitioner has named in her petition for divorce as the woman with whom her husband has committed adultery is entitled to intervene after decree nisi to show cause against the decree nisi being made absolute. [The learned judge read s. 183, sub-s. 2, of the Judicature (Consolidation) Act, 1925, and continued:] The relevant facts which raise the matter in issue are that on February 6, 1935, the petitioner filed a petition for

(1) [1928] P. 148, 153.
(2) (1864) 3 Sw. & Tr. 530.
(3) [1930] P. 77.
(4) (1869) L. R. 1 P. & M. 739.

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the dissolution of her marriage with the respondent on the ground of his adultery with the woman named. The adultery was alleged to have taken place at 9 Pembroke Place, Kensington, and on the 20th to 24th days of November, 1934, at the Charing Cross Hotel. The petition contained the usual notices addressed to the respondent and the woman named in the petition. The notice to the woman named was as follows: "Take notice that you are entitled within eight days after delivery hereof to you inclusive of the day of such delivery to apply upon summons for leave to enter an appearance . . . . for leave to intervene in this cause. . . . ."

The respondent duly appeared by his solicitor to the petition. The petition was served on the woman named, and she signed an admission on the copy petition that she was the woman named, but she did not apply for leave to enter an appearance. The respondent filed no defence and the petition was undefended. On June 27, 1935, I pronounced a decree nisi. At the hearing the only evidence was of adultery at the Charing Cross Hotel. In accordance with precedent the decree nisi merely stated that the respondent had been guilty of adultery and did not refer to any woman's name as being the person with whom the husband had committed adultery.

When six months had expired from the date of the decree nisi the petitioner did not take the necessary steps to get the decree nisi made absolute. On February 22, 1936, solicitors appeared in the divorce proceedings for one A. B., the appearance being stated to be on behalf of a member of the public to show cause against the decree nisi being made absolute. On February 25, 1936, A. B. filed an affidavit in support of her intervention. The gist of this affidavit was that she swore that she was the woman named in the suit, and that she and the respondent agreed to supply evidence to the petitioner so that she might divorce her husband, and in pursuance of this agreement she and the respondent went to the Charing Cross Hotel on November 20 for three nights, but that no sexual intercourse took place

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between them and she in fact had never committed adultery with the respondent.

In due course the intervener took out a summons addressed to the petitioner to show cause why an order should not be made for directions upon the issues raised by her intervention in the suit. On the hearing of this summons, I directed that a copy of the summons should be served upon the respondent, and at the adjourned hearing ordered that the summons should be adjourned into open Court for argument. The respondent filed an affidavit in which he swore that he had in fact committed adultery with the intervener at the Charing Cross Hotel, and that there was no collusive arrangement of any sort between himself and his wife as to the bringing of divorce proceedings. The petitioner also swore an affidavit in which she swore that there was no collusive arrangement of any sort between her and her husband.

Before the further hearing of the summons for directions, the respondent took out a summons to show cause why the appearance entered on February 22 by a member of the public, namely, A. B., should not be struck out, and it is on the hearing of this summons that the present matter in issue has to be decided by the Court.

As I have already said, the point is whether a woman named in a divorce petition comes within the description of "any person" as used in s. 183, sub-s. 2, of the Judicature (Consolidation) Act, 1925.

Having regard to the general words "any person" used in the section it appears to me that the burden is cast upon the respondent to satisfy the Court that the intervener is not included in the words "any person." Counsel on behalf of the respondent argued that "any person" in the section meant any member of the public, and that the intervener was not a member of the public because she was in fact the woman named in the petition, and had been served with it. I was referred in argument to three cases in which the Court has considered the application of the words "any person" in the statute. In 1861 in *Stoate* v. *Stoate* (1), the Judge

(1) 2 Sw. & Tr. 384.

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Ordinary, Sir Creswell Creswell, decided that a respondent against whom a decree nisi for dissolution of marriage had been pronounced had no right under s. 7 of the Matrimonial Causes Act, 1860, to show cause against the decree nisi being made absolute and that her proper remedy was to apply for a new trial. In 1884 the decision in *Stoate* v. *Stoate* (1) was quoted in argument and approved by the Court of Appeal in *Howarth* v. *Howarth* (2), where it was held that the uncle of the respondent might intervene under s. 7 of the Matrimonial Causes Act, 1860, unless he was acting merely on behalf of the respondent. In that case Baggallay L.J. said at p. 224 that "It appears to me, therefore, that assuming (the uncle) to be an independent intervener, not an intervener acting in collusion or by arrangement with any of the parties to the suit, there were circumstances which would justify the intervention." Again (3), Baggallay L.J. pointed out: "Until the Act of 1860, the right of intervention did not exist, but by that statute provision was made for intervention in one of two ways, the one being by the intervention of any third party, the other being by intervention of the Queen's Proctor." Lindley L.J. (4) said: "Let us consider the meaning of 'any person.' It has been decided and properly that 'any person' does not include the respondent. The respondent has other means of applying to the Court besides availing himself of this intervention proceeding. . . . . So far as I know 'any person' means anybody except the respondent and somebody who is the respondent in disguise, his agent or his puppet." In 1901 it was decided that the co-respondent is not "any person" within the meaning of the section. In *Harries* v. *Harries* (5) a co-respondent in a divorce petition endeavoured to intervene under s. 7 of the Act of 1860. He had entered an appearance but had not defended the suit. Gorell Barnes J., as he then was, decided that a co-respondent cannot intervene under s. 7 of the Act of 1860, and said: "A respondent cannot intervene to

(1) 2 Sw. & Tr. 384.
(2) 9 P. D. 218, 223, 224, 228.
(3) Ibid. 223.
(4) Ibid. 228.
(5) 86 L. T. 262.

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prevent a decree nisi being made absolute. The authorities are clear upon the point. A co-respondent is in no better position than a respondent. It seems to me a novel idea that a co-respondent should seek to intervene as a member of the public." It is, however, important to note that Gorell Barnes J. was dealing with the case of a co-respondent who had actually appeared in the proceedings.

Having regard to those three cases it appears to me that the question which I have to decide is whether the facts of this case were such as to constitute the intervener a party to the divorce proceedings.

When *Harries* v. *Harries* (1) was decided the Court had power to direct that a woman named in the petition as the person with whom the respondent had committed adultery be made a party under s. 28 of the Matrimonial Causes Act, 1857. That section enacted in effect that on every petition presented by a wife for dissolution of marriage the Court if it sees fit may direct that a person with whom the husband is alleged to have committed adultery be made a respondent. The result of this section, as Gorell Barnes J. pointed out in *Harrop* v. *Harrop* (2), was that the husband seeking to obtain a dissolution was bound to make the adulterer a co-respondent, and the Court might make the adulteress a respondent when the wife sought similar relief.

In 1907 it was enacted by s. 3 of the Matrimonial Causes Act, 1907, that "in every case not already provided for by law, in which any person is charged with adultery with any party to a suit or in which the Court may consider, in the interest of any party not already a party to the suit, that such person should be made a party to the suit the Court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the Court may think just." This section has been repealed and has been replaced by s. 197 of the Judicature (Consolidation) Act, 1925.

The machinery for obtaining leave to intervene in a case such as this is now contained in rr. 17–19 of the Matrimonial Causes Rules, 1924. Rule 17 of these Rules is as follows:

(1) 86 L. T. 262.

(2) [1899] P. 61, 63.

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"Where the husband is charged with adultery with a named person a sealed copy of the pleading containing such charge shall be delivered to the person with whom adultery is alleged to have been committed, indorsed in lieu of notice to appear with notice that such person is entitled within eight days after delivery thereof to apply for leave to intervene in the cause. Such delivery and notice may only be dispensed with by order upon summons for cause shewn."

Rule 19 is as follows: "Parties intervening must join in the proceedings at the stage at which they find them, unless otherwise ordered by the Registrar." Service on a person with whom a husband is charged with adultery is personal and must be proved by the usual affidavit, unless such person shall have intervened.

It was argued that mere service of the petition upon the woman named made her a party by virtue of s. 225 of the Judicature Act, 1925. This section enacts that in this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned them: "'Party' includes every person served with notice of or attending any proceeding although not named on the Record."

I do not think that the argument that mere service of the petition upon the woman named makes her a party is sound. If she becomes a party then she has presumably the right to take part in the proceedings. If so then mere service would in effect make it unnecessary for her to apply for leave to intervene; but under the statutes she has no absolute right to intervene, but merely has a right to apply for leave to intervene under s. 197 of the Judicature Act, 1925, or she may be made a respondent by order of the Court under s. 177, sub-s. 2, of the Judicature (Consolidation) Act, 1925. (1)

If the proceedings for divorce were a personal matter between the parties alone, it would, I think, be unjust and contrary to public policy, which requires that litigation if

(1) Judicature (Consolidation) Act, 1925, s. 177, sub-s. 2: "On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent."

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possible should not be unduly prolonged, that a woman in the position of the intervener in this case should be allowed to intervene after the hearing of the case. Her opportunity to apply for leave to intervene arose as soon as the petition was brought to her notice, and she should have acted then.

But the Legislature by the various statutes that have been passed has clearly indicated that proceedings for divorce are not merely a personal matter but are also a matter of public interest. Sect. 178 of the Judicature Act, 1925, states that on a petition for divorce it becomes the duty of the Court to satisfy itself so far as it reasonably can as to the facts alleged. In this connection Lord Merrivale P. in *Sloggett* v. *Sloggett* (1) when dealing with that section, said: "Contrary to the ordinary course of trial of civil proceedings the Court is required not only to deal with issues raised by the parties but with independent matters deemed by the legislature fit to be dealt with in respect of a larger interest, that namely of the community." It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured so as to indicate adultery where none in fact has taken place.

The Act of 1860, as Lord Westbury pointed out four years later in *Lautour* v. *Her Majesty's Proctor* (2), was passed with the object of giving the whole of the public as well as the Queen's Proctor the power to give information to the Court in the interval between the decree nisi and the decree absolute, which would relieve the Court from being misled by the petitioner and from pronouncing a decree under circumstances where the petitioner was not entitled to such a decree. The Act has effected this purpose by introducing a period of time between decree nisi and decree absolute during which the King's Proctor or any person may intervene. After the Act of 1860 was passed I think a woman named in the petition would be entitled to intervene after the decree nisi if the Court had not made her a respondent to the suit under the Act of 1857. I do not think that the fact that the woman named now has the petition served upon her makes

(1) [1928] P. 148, 153. (2) (1864) 10 H. L. C. 685, 699.

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any substantial difference to her position unless she in fact applies for leave to appear to the proceedings before decree nisi and obtains leave to intervene. Once she has done that then I think she does become a party to the suit in fact, and has no right to intervene after decree nisi under s. 183.

If the argument put forward on behalf of the petitioner were right, the result would be to take away from a woman an important statutory right, to intervene after decree nisi in a matter of public interest, namely, proceedings for divorce, merely by service on her of the petition for divorce, in which she is mentioned as being the woman with whom the respondent has committed adultery.

In my view a woman so named in a petition does not become a party to the proceedings until she has applied for leave and has obtained leave to intervene, and mere service of the petition upon her without any subsequent action on her part does not make her a party. Unless and until the woman has obtained leave to intervene she remains within the class of " any person " referred to in the section, and therefore has the right to show cause after decree nisi which the section has given her. After the woman has obtained leave to intervene, her right under s. 183 disappears in accordance with the decisions to which I have referred, because she then becomes a party to the suit.

For these reasons this summons is dismissed.

Solicitors : *J. B. de Fonblanque ; Braikenridge & Edwards ; Piper, Smith & Piper.*

R. M. M.

1936
April 3, 7.

MENON *v.* MENON AND WARTH.

Divorce—Petition of husband—Claim for damages—Previous Common Law action by husband against co-respondent for enticement of respondent wife—Measure of damages substantially the same in respect of each cause of action.

Although the causes of action on a claim for the enticement of a wife and on a claim for damages in divorce against the same defendant in respect of adultery committed by him with the wife are not identical, the measure of damages in a case where there has been adultery may be practically the same under both causes of action. This applies to the loss of consortium and the loss of services of the wife as well as to the adultery. If the action for enticement is disposed of before a petition for divorce and all the circumstances relating to adultery must have been in the contemplation of the parties when the action was disposed of, practically all the damages available to the husband have been awarded in the action for enticement. Further damages are only obtainable in divorce if some grave matter for consideration has not been dealt with in the enticement action.

Observations on the combination at the instance of a husband of the two remedies and the attendant claim for double damages.

The petitioner, Screecant Krishna Menon, a Civil Servant of Indian origin but domiciled in England, filed a petition for divorce dated July 4, 1935, charging his wife, the respondent Ivy Lillian Menon, with adultery with Joseph Warth, against whom he claimed 2000*l.* damages. The respondent did not defend the suit. On May 20, 1935, the petitioner had issued a writ in the King's Bench Division against the co-respondent Warth claiming damages for the alienation by the co-respondent of the affection for the plaintiff of the respondent, the wife of the plaintiff, and alleging that the co-respondent had enticed and procured the respondent to depart and remain absent from the house and society of the petitioner and had wrongfully received and harboured the respondent and that by reason of the premises the petitioner had lost the society and services of the respondent. On June 13, 1935, without this latter action coming on for trial, the petitioner was paid by and accepted from the co-respondent the sum of 542*l.* in agreed settlement of the claim in the action—namely, 500*l.* as agreed damages and 42*l.* for costs.

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By his answer to the petition for divorce, the co-respondent admitted the adultery charged against him, contested the claim for damages, pleading that they were excessive on the ground of the settlement arrived at of the action in the King's Bench Division, and prayed the rejection of the claim for damages now made.

There were three children of the marriage, and the respondent had given birth to a fourth child of which the co-respondent was the father. The petitioner was aware of this fact at the time when the enticement action was settled.

At the conclusion of the evidence of adultery THE PRESIDENT (SIR BOYD MERRIMAN) found that the respondent and co-respondent had committed adultery and the only question remaining for the jury and calling for report was the measure of the damages having regard to the previous proceedings in the King's Bench Division.

R. Castle-Miller for the petitioner. The damages in an action for enticement are given for the loss of consortium with the wife, her value as a housekeeper and the loss of her services. They may be described as damages at large. The damages now claimed are grounded on a special circumstance—namely, the adultery and the complete loss of the wife in consequence.

[THE PRESIDENT. If the issue in the action for enticement had gone to a jury, they would have been told of the adultery and the birth of an illegitimate child and they could not have been stopped from considering those matters.]

It is conceded that, though in law the causes of action are distinct, there is in substance no difference between the basis on which damages in the divorce petition may be, and damages in the enticement might have been assessed.

W. Latey (*A. C. D. Jackson* with him) for the co-respondent. The causes of action at common law and in this Court may be different; but the measure of damages is the same, being the loss of the wife assessed in money. The petitioner, having the whole facts within his knowledge, has agreed to the assessment of damages, and, having done so, cannot reopen

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the assessment now. He is not entitled to any damages in divorce. [He referred to *Place* v. *Searle* (1), in which McCardie J. in the course of his judgment said: "I may perhaps permit myself here to say that whatever may be the true basis of actions for enticement it seems clear that, unless carefully watched and checked by the Courts, they may easily develop into recognized methods of wrongful pressure and improper extortion" and to *Pacheco de Cespedes* v. *McCandlish* (2), where the Court of Appeal confirmed an order of Swift J., who in a similar case ordered the postponement of the hearing of an action for enticement pending the disposal of divorce proceedings in which the defendant in the action for enticement was charged with adultery and damages were claimed against him.]

In directing the jury, THE PRESIDENT [after quoting from the judgment of McCardie J. in *Place* v. *Searle* (1) and suggesting that a jury might not unfairly consider whether a similar view might be true of an attempt to combine an action for enticement with a claim for damages in divorce and dealing with the principles on which damages are awarded in the Divorce Division, proceeded as follows:] You may well think that, taken by itself apart from the consideration which I am going to put before you, in the abstract this is a case in which a moderate sum of damages might well be claimed by the husband. Then we come back to the enticement action, because as you now know, indeed it has been part of the case of the co-respondent throughout, he has paid this sum in voluntary settlement—it never went to a jury—of the action between himself and the husband in respect of the enticement of the wife. I have asked what was the difference as to the basis of assessment of damages against the co-respondent in the one case and the other. We now have an admission by counsel for the petitioner that although as is the fact and, as I shall direct you in law, the causes of action for enticement and for damages for adultery are not identical, yet there is in substance no difference between the

(1) [1932] 2 K. B. 497, 504. (2) The Times, Nov. 23, 1935.

basis upon which damages in this divorce petition may be and those in the enticement action might have been assessed by a jury in the circumstances of this case. I could not rule that the two causes of action are the same. Manifestly they are not, for one, if for no other reason, that damages here must be based upon the fact of adultery and nothing else. They are ancillary to the charge of adultery. In an action for enticement adultery is not of the essence of the claim at all ; it is the enticing away of the wife from the home which is the essence of the claim. But the admission made by counsel for the petitioner was obviously right, because in substance there cannot be any difference between the two, in the circumstances of this case. Suppose the action for enticement had been fought out, counsel addressing the jury would have told them, and the judge would have told them, that they were entitled to take into account that the enticement began by the co-respondent being introduced in the position of a lodger into the husband's house and offering to the wife—if he did—counter attractions that he was able to pay for. In either aspect of the case, adultery or enticement, you are not punishing the man. In this petition you are assessing damages for the fact that he did commit adultery, and that as a result there has been a child. This also would plainly have come into the consideration of a jury in the action for enticement ; for as was said by Greer L.J. in the Court of Appeal in *Pacheco de Cespedes* v. *McCandlish* (1) experience showed that it was impossible to leave out of consideration the fact that it might be said that a wife was enticed to leave her husband so that adultery might be committed, and that it seemed incredible that the action for enticement could go on and no reference in it be made to the adultery which it was alleged followed the enticement of the wife. Again, in particular, common to both forms of action there is the loss of a wife as a wife and the loss of a wife as a mother. On the one hand the husband saves the expense of keeping the wife ; on the other hand he has to put his hand into his pocket to find some one to look after the children. All these things quite manifestly

(1) The Times, Nov. 23, 1935.

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would come into the basis of assessment of damages in the one case or the other and these are the sort of things which the jury are entitled to take into account. You will see the importance of the fact that these things are common to both cases. You may wonder why you are asked to give damages at all when a sum has already been assessed between the parties in a case in which all these elements have been taken into account. The sum of 500*l.* was reached as a voluntary settlement between the solicitors on behalf of both parties dealing with the claim in all its elements. The sum claimed is in substance admitted to have had the same elements as are present in the claim for damages for adultery. You may ask yourselves, and it is a question you should most earnestly consider when the husband has himself assessed the damages containing those elements at the sum of 500*l.*, why any jury should be asked to assess them in another form. Of course if you thought that the original assessment was so ridiculously out of proportion to the damages which you think should be awarded for adultery that they could not possibly have been intended to cover the whole ground, or that there is some ground which obviously was not taken into consideration on that occasion, there is no reason in law why you should not award some sum for damages provided that you take into account that 500*l.* has already been received. If it could be said that there was something at the time of the settlement of the action for enticement which was not known, some grave element in the case which had been overlooked or concealed, then I can understand a jury taking the view that inasmuch as that would not have been taken into account in fixing the previous figure, some overplus must be awarded now in respect of the circumstances of aggravation which were not known at the time. [THE PRESIDENT referred to the dates of the different proceedings, pointing out that it appeared that the action for enticement was prepared though not commenced until after the evidence for the divorce petition was obtained, and continued :] I do not know whether it will commend itself to you for a man to accept a full settlement in an action without indicating that he proposes in substance to make

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the same claim again in another action. A sum has already been accepted for something which in substance is very much the same as the present claim. Damages do not follow as a matter of course from the right to a decree of divorce; the petitioner has got to prove that in all the circumstances of the case he is entitled to damages. Unless he does that there is no obligation on a jury to award them.

The jury returned a verdict that taking into consideration that 500*l.* had already been paid no further award of damages should be made.

THE PRESIDENT pronounced a decree nisi and made no order as to costs, the petitioner having already received 42*l.* costs in the action for enticement.

Solicitors for the petitioner: *Lake & Son.*
Solicitors for the respondent: *Wood & Wootton.*

R. M. M.

HERD *v.* HERD.

1935
July 31.
1936
July 6, 17.

Divorce—Wife's suit—Domicil of husband—Desertion—Jurisdiction.

Since the decisions of the House of Lords in *Lord Advocate* v. *Jaffrey* [1921] 1 A. C. 146 and of the Privy Council in *Attorney-General for Alberta* v. *Cook* [1926] A. C. 444 that there can only be a single matrimonial domicil of the husband and wife in which proceedings can be maintained to dissolve the married status, no exception to that general rule can be admitted in the case of a wife deserted by her husband in the original matrimonial domicil. Under such circumstances the wife cannot be allowed to assert for the purpose of maintaining proceedings that the original domicil of the husband is still subsisting and that the English Court retains jurisdiction to dissolve the marriage when the husband has acquired a domicil of choice elsewhere. The suggestion in the judgment of the Court of Appeal in *Ogden* v. *Ogden* [1908] P. 46, 78, that this exception to the general rule exists can no longer be regarded as law after the decisions of the higher tribunals.

WIFE'S PETITION for dissolution of marriage on the ground of the adultery of her husband.

1935

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The parties were married in England in 1905, both of them being born of English parents in England. Their matrimonial home was in England and their domicil English. There was one child of the marriage. In 1923 the husband left his wife in England and went to the United States. In 1932 his wife discovered that he was living with another woman. She wrote a letter to him as follows: "Would you let me know if you have decided to remain in America or whether you intend to come to England eventually. I am told I must know this as my nationality is the same as yours." He replied: "You ask, do I intend to remain in America altogether? Yes, I have no thought of returning to the old country." The wife's solicitors then wrote to him, saying: "We have ascertained that you are cohabiting with another woman, who is described as your wife and our client has been advised to take proceedings for divorce. If, as she understands, you have abandoned your English domicil and have renounced any intention of ultimately returning to England, our client's proper course would appear to be to travel to the U.S.A. and sue there for divorce. If, on the other hand,you have not abandoned your English domicil and propose ultimately to return to this country, her course of action will be different and she will take steps to obtain a decree in this country. Our object in writing is to ascertain, regardless of the course which your answer will involve, in what country you are now domiciled and we shall be glad to have your answer as soon as possible." The husband replied, "I have no present intention of returning to Great Britain."

On November 23, 1934, the wife filed her present petition on the ground of the alleged adultery of the husband from 1925 in the United States. The petition contained the usual averment of an English domicil of the spouses. The husband did not enter an appearance. At the hearing evidence was given that the husband had been living with another woman for many years in the United States. Having regard to the statements by the husband in his letters the Court (Bucknill J.) adjourned the hearing for the intervention of the King's Proctor

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to argue the question of jurisdiction. (1) At this adjourned hearing it was proved that the respondent husband was naturalized in the United States on December 22, 1930. Expert evidence of the law of the United States was given that in order to obtain naturalization the respondent was bound to declare on oath his bona fide intention to become a citizen of the United States and to renounce allegiance to any state of which he might at the time be a citizen, and also within two years of so declaring state in writing his intention of permanently residing within the United States. Without objection on behalf of the petitioning wife a statement by H.M. Consul-General at New York was tendered in evidence on behalf of the King's Proctor that the respondent had been living in the United States since 1919 with another woman, and that all the requirements of naturalization had been complied with and that the respondent had told the Consul-General that he had no intention of leaving the United States, which he had adopted as his permanent home.

The Solicitor-General (*Sir T. J. O'Connor K.C.*) (*Clifford Mortimer* with him) for the King's Proctor: There is no jurisdiction in the Court to entertain the petition. No doubt there is some foundation to be found in the cases for the view that when a wife who has been domiciled with her husband in England is deserted by him before the commencement of proceedings to dissolve the marriage, a species of estoppel arises and the husband is not to be allowed to set up that his English domicil has ceased. This view is expressed in this Court in *Armytage* v. *Armytage* (2), and in *Ogden* v. *Ogden* (3) the Court of Appeal, whilst affirming domicil to be the test of jurisdiction to dissolve a marriage, proceeds to lay down that it is "no real

(1) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 181, sub-s. 1: "The court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued. . . . ."

(2) [1898] P. 178, 185.

(3) [1908] P. 46, 78.

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exception to this principle that in cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce it has been held that she might sue in the Courts of the country of the domicil, notwithstanding the fact that the husband has left the country, and might possibly have done so with the intention of acquiring a domicil in another country." But this view can no longer be entertained as law since the judgment of Lord Haldane in the House of Lords in *Lord Advocate* v. *Jaffrey* (1) and that of the Privy Council in *Attorney-General for Alberta* v. *Cook* (2). The decisions in those cases and in *H.* v. *H.* (3) must be taken to have finally disposed of it.

A. Richard Ellis for the petitioner: The net result of the evidence is that the respondent has not yet acquired a domicil of choice in the United States, but that he has at most no present intention of returning to this country. He has not appeared to object to the jurisdiction. His residence in the United States may be said to be merely temporary, which will not affect the original domicil: *Lauderdale Peerage* case (4), *Winans* v. *Attorney-General* (5).

Cur. adv. vult.

1936. July 17. BUCKNILL J. [after stating the facts:] Counsel for the petitioner argued that these facts did not establish that the respondent had acquired a domicil of choice in the State of New York. He argued that the respondent had been obliged by American law to become a naturalized citizen there if he wished to stay in the country for any considerable period of time, and that the fact that he had been naturalized did not prove that he intended to make the United States his permanent home. He also argued that the respondent in his letter only said that he had no present intention of returning to Great Britain. He also relied on the fact that the respondent had not appeared to the petition and had not objected to the jurisdiction of the Court on the ground that he was not domiciled in England.

(1) [1921] A. C. 146, 152.
(2) [1926] A. C. 444.
(3) [1928] P. 206.
(4) (1885) 10 App. Cas. 692.
(5) [1904] A. C. 287.

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The intention of a man to acquire a domicil of choice is a matter of fact, and the burden of proof is on him who asserts such intention. In this case there must be satisfactory evidence of a fixed and settled purpose on the part of the respondent to abandon England as his domicil and of a determination on his part to make his home in the United States, and also that he has made it his home, " with the intention of establishing himself and his family there and ending his days in that country," to use the words of Lord Cairns in *Bell* v. *Kennedy* (1) and quoted by Lord Macnaghten in *Winans* v. *Attorney-General.* (2)

On the other hand the Solicitor-General argued that the facts in this case clearly established that the respondent had acquired a domicil of choice in the United States. In my judgment the contention of the Solicitor-General is right. Not only has the respondent solemnly declared that his intention is to reside permanently in the United States, but it seems to me that he has done everything that a man in his circumstances reasonably can do to prove his intention. I, therefore, hold that at the time when the petition was filed in these proceedings the respondent was domiciled in the United States, and had lost his domicil of origin in England. On that finding of fact the general rule of law applicable to the point at issue is stated by Lord Merrivale in *H.* v. *H.* (3) thus : " Under British law the jurisdiction to decree divorce depends on domicil ; the domicil of the husband determines the domicil of the wife ; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign States." Counsel on behalf of the petitioner argued that although this is the general rule of law the rule does not apply where the husband, having his domicil of origin in England, has married his wife in England, and has deserted her in England, and has gone abroad, and in divorce proceedings by the wife has not himself appeared and objected to the jurisdiction on the ground that he is no longer domiciled in this country. There is no precise

(1) (1868) L. R. 1 H. L. Sc. 307, 311. (2) [1904] A. C. 287.
(3) [1928] P. 206, 212.

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authority on this point, but it appears from the remarks of Sir Gorell Barnes when pronouncing the judgment of the Court of Appeal in *Ogden* v. *Ogden* (1), that in undefended cases for dissolution of marriage there was at one time a practice in the Divorce Court of granting a decree of divorce although the domicil of the husband in this country was not established. In that case Sir Gorell Barnes said: "In cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the courts of the country of the domicil notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicil in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicil, or, as some have thought, that the wife must ex necessitate be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, and to require its courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicil, and any domicil with which it were sought to fix him."

No reported case was brought to my notice in which the Divorce Court has decreed the dissolution of a marriage in a case in which the husband was domiciled abroad at the time when the petition was filed. In *Ogden* v. *Ogden* (1) the point for the decision of the Court was whether a marriage in England between an English woman and a Frenchman was in fact a valid marriage. Having regard to the expressions of Sir Gorell Barnes in *Ogden* v. *Ogden* (1) to which I have referred, and to the absence of any precise authority, I have looked up the majority report of the Royal Commission on Divorce, which was signed by Sir Gorell Barnes as Chairman in November, 1912, four years after the decision in *Ogden* v. *Ogden* (1) to see whether it contains any reference to the practice referred to in that case. (1) Paragraphs 343 and 344 of this report

(1) [1908] P. 46.

state that: "As the wife's domicil is according to our law that of her husband, it follows that in strictness if he deserts her and proceeds abroad with the intention of acquiring a new domicil he can defeat her case unless some provision be made to protect her. Most, if not all, of the cases of this kind have been undefended cases, and the difficulty has been got over by adopting the view, in order that justice may be done, either that the husband cannot be heard to say that he has changed his domicil, or perhaps that the wife may be treated as having by her husband's act, acquired a domicil of her own. The question has never been raised in a contested case." Since the judgment in *Ogden* v. *Ogden* (1), however, three cases have been decided in the Privy Council, in the House of Lords and in the Divorce Court, which appear to preclude me from following the practice which had the approval of the Court of Appeal in *Ogden* v. *Ogden* (1) of assuming jurisdiction in a case such as the present. The first suggestion made in the judgment in *Ogden* v. *Ogden* (1) that under certain circumstances the wife must be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, is inconsistent with the speech of Lord Haldane in the *Lord Advocate* v. *Jaffrey* (2), when he said: "Since *Le Mesurier* v. *Le Mesurier* (3) . . . it has been clear that nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce, and that the old notion is now obselete, that there can be, short of such a full domicil, a so-called 'matrimonial domicil' which can give the same result. I think that it is implied as a consequence not less plain, that there can be only one real domicil. Not only is there no authority for the proposition that under the laws of these islands husband and wife can have, while they continue married, distinct domicils, but if it were otherwise the consequences in such circumstances as those before us would be extraordinary. Proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results." In the case of *Attorney-General* v.

(1) [1908] P. 46. (2) [1921] 1 A. C. 146, 152.
(3) [1895] A. C. 517.

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Cook (1) a petition for divorce was dismissed on the ground that the Court had no jurisdiction, because the husband respondent was not domiciled within the jurisdiction of the Court. The petition was undefended and the husband did not appear. Lord Merrivale in that case pronounced the judgment of the Board and said: "In so far as British Tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction." The other suggestion made in the judgment in *Ogden* v. *Ogden* (2) that the husband cannot be heard to say that he has changed his domicil in such a case as this, has been repudiated in the judgment of Lord Merrivale in *H.* v. *H.* (3) In that case the husband and wife were married in England in 1915. Six years later, in 1921, a decree of judicial separation was pronounced at the instance of the wife. In 1928 the wife petitioned for a dissolution of the marriage on the ground of her husband's alleged adultery in France in 1927 and in 1928. The husband appeared under protest, alleging that he had not an English domicil and that he had been domiciled in France since 1923. The actual point for decision in that case was whether the husband's appearance under protest should be disallowed, in other words whether his plea was good in law, even if the facts established the change of domicil. It was argued on behalf of the wife that the husband under the circumstances was estopped from asserting a change of domicil.

Lord Merrivale held that in that particular case the husband was not estopped from setting up a domicil of choice abroad acquired after a decree of judicial separation had been made against him in this country. In the course of his judgment Lord Merrivale said (4): "An issue of domicil, therefore, is not to be prejudged so as to give effect to a presumption of law, but is to be duly tried to determine the relevant matters of fact." "Upon the trial the Court will determine whether the respondent has taken up his residence in France and is in

(1) [1926] A. C. 444.
(2) [1908] P. 46, 78.
(3) [1928] P. 206, 212.
(4) Ibid. 214.

truth resident there with that intention which combined with residence results in a change of domicil."

It was argued before me on behalf of the petitioner that the case now under consideration differed from *H.* v. *H.* (1), because in this case the respondent has not appeared to protest against the jurisdiction or to allege that he has acquired a domicil of choice and that he has abandoned his domicil of origin. I was also asked to assume that the Courts of the United States would probably recognize as valid a decree of divorce if made in this case, although the husband is domiciled there and to grant a decree upon that assumption. I do not think that I ought to deal with the case in this way. My duty as prescribed by s. 178, sub-s. 1, of the Judicature (Consolidation) Act, 1925, is to satisfy myself as to the facts alleged in the petition. One of the facts alleged therein is that the husband and wife were domiciled in this country when the petition was filed. As Scrutton L.J. remarked in *Hyman* v. *Hyman* (2): "The [Divorce] Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties." In this case I have to regard the facts as they are proved to me. I have also to consider the submission of the Solicitor-General on behalf of the King's Proctor that in this case the Court has no jurisdiction. If the facts establish, as in my judgment they clearly establish, that the respondent acquired a domicil of choice in the United States before the petitioner filed her petition, then I must apply the rule of law laid down in the House of Lords and the Privy Council that the Court has no jurisdiction in such a case to make a decree of dissolution of the marriage.

Solicitors: *The King's Proctor; Attwater & Liell.*

(1) [1928] P. 206. (2) [1929] P. 30.

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June 25;
July 16, 24.

JACKSON *v.* JACKSON & BARWELL.

Divorce—Practice—Costs—Suit by poor person—Costs against co-respondent—"Special circumstances"—Means of co-respondent—Poor Persons Rules.

The fact that the co-respondent to a petition for divorce prosecuted by a poor person has means is not a "special circumstance" within the meaning of Order XVI., Rule 31 (*b*) (2), entitling the Court to condemn the co-respondent in profit costs at the instance of the petitioner.

THE husband, petitioner for divorce, suing as a poor person, claimed damages from the co-respondent and was awarded 200*l.* by the jury. The adultery was not contested; but the co-respondent contested the amount of damages. The case presented no special circumstances. Counsel for the petitioner asked for an order that the co-respondent should pay the petitioner profit costs on the ground that the evidence showed that he had sufficient means.

1936. July 16. *A. Richard Ellis* for the petitioner.
Theodore Turner for the co-respondent.
(The arguments consisted of citation of the rules of court and reported cases, all of which appear in the judgment.)

Cur. adv. vult.

July 24. BUCKNILL J. The rule at present dealing with the matter is Rule 31B (2.) of Order xvi., and came into force on January 1, 1935. The effect of this rule, so far as the present case is concerned, is that the Court may order the out-of-pocket expenses of the petitioner to be paid by the co-respondent, and may order the co-respondent to pay the costs of the petitioner, including profit costs, but excluding fees to counsel or court fees, if the co-respondent has acted unreasonably in defending the proceedings or in his conduct of them or the special circumstances of the case require it. It was argued that in this case the fact that the co-respondent

had some means constituted special circumstances which required me to make an order that the petitioner should have profit costs. The argument was that it would be unjust to the petitioner's solicitor if in such a case he was to have no financial remuneration for his work, and that this view had been judicially recognized in the case of *Gribble* v. *Gribble* (1), where profit costs had been granted. In that case the wife petitioner, suing as a poor person, proved that her husband had left her and gone to New Zealand with another woman. It was argued that the fact that the man could afford to go with another woman to New Zealand constituted special circumstances in the case to justify the Court in ordering profit costs under Order xvi, Rule 31B, of the then existing rules.

Bateson J. made an order for profit costs apparently on the ground that the husband left his wife and went off to New Zealand with another woman.

In *Lawrence* v. *Lawrence and Hendry* (2) the husband was the petitioner and sued as a poor person. In that case Lord Merrivale is reported to have said that if costs could be recovered against the co-respondent he saw no reason why the Poor Persons Rules should shelter him. In *Davis* v. *Davis and Mutter* (3) the petitioner husband sued as a poor person and obtained 1000*l.* damages from the co-respondent. On the question of costs Bateson J. is reported to have said "that he thought it necessary for the protection of solicitors generally that if there were circumstances in poor persons cases in which they could recover something towards the costs of their efforts they should do so. There was a great deal of poor person's work which they did for nothing, but it was right that when a proper case came along they should be remunerated." "The hearing of the present case had occupied two days and he thought that it was a proper case for profit costs." These cases were all decided under the rule which preceded the rule now in force. That rule states in effect

(1) (1929) 45 Times L. R. 192.
(2) (1929) Times Newspaper, April 17th, 1929, p. 5.
(3) (1933) Times Newspaper, March 11th, 1933, p. 3.

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that where it appears to the judge that the special circumstances of the case require it, the judge may order that the costs shall include profit costs and charges, but not any fee to counsel. So far as *Davis* v. *Davis and Mutter* (1) is concerned, the unusual length of time occupied (which is now a feature specially dealt with under 31B (3.) of Order xvi.) would be " special circumstances " under the old rule.

It is clear from the Report of the Poor Persons Procedure Committee dated July 30, 1934, and published by H.M. Stationery Office in 1934, on which the present rule is based, that the framers of the rule were largely concerned with the question whether, and if so when, profit costs ought to be paid by an unsuccessful party to a suit brought by a poor person.

So far as this case is concerned the new rule specifies three grounds on which profit costs can be ordered, namely :—

Unreasonable defence or conduct of the co-respondent,
Proceedings of unusual length or difficulty, and
" Special circumstances."

If the framers of the rule wished to include as a ground for ordering profit costs the fact that the co-respondent had sufficient means to pay them the rule could and, as I think, would have said so. The only reference to the means of the other party as a material factor on the question of costs is Rule 31B, sub-s. 5. This states that where an order is made to pay costs under this rule the order shall not be enforced without the leave of the court or a judge, and the court or judge may refuse leave if satisfied by the party ordered to pay the costs that he has not the means to pay them. In other words, consideration of the question as to the means of any party to pay profit costs seems to be postponed until the time comes for enforcement of the order. Moreover, the fact that the co-respondent has some means can hardly be said to constitute special circumstances which require a special order for profit costs. As counsel for the co-respondent pointed out, claims for damages are not usually made against men of no means.

(1) See note (3), ante, p. 215.

The position of a poor person litigant is peculiar as regards costs. Order xvi., Rule 28, of the Supreme Court Rules expressly enjoins that unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges. The power of the court to order costs to be paid by another party in a poor person's case is limited by the provisions of the subsequent Rule 31 of the same Order xvi., to which I have already referred.

Although it may seem hard on the solicitor who undertakes a poor person's case that profit costs cannot be recovered against a co-respondent who has means, some provision is made for his remuneration by Rule 31 of Order xvi. That rule enables the judge to order to be paid to the solicitor out of any money recovered by the poor person a sum in respect of costs, which may not exceed one-fourth of the amount recovered after deduction of all proper disbursements made by the solicitor.

The old rule as to costs in the Divorce Court where the petitioner sued as a pauper followed the rule of the common law, and did not allow the petitioner to receive any profit costs from the co-respondent. *Richardson* v. *Richardson and Plowman.* (1) The basis of the common law rule, as explained in *Carson* v. *Pickersgill* (2) by Lord Esher M.R., was that in ordinary cases where the plaintiff succeeded, the defendant was bound to pay the reasonable costs which the plaintiff had paid or made himself liable to pay in consequence of the defence, but in a case where the pauper plaintiff was not liable to pay costs the plaintiff was not allowed to make a gift out of his pocket to the lawyers who had been engaged on his behalf in the form of a gratuitous payment of fees to them, and then to demand reimbursement of these sums from the defendant.

The rule as to costs in proceedings in formâ pauperis laid down in *Carson* v. *Pickersgill* (2) prevailed until 1914. In 1914 proceedings by paupers were renamed proceedings by poor persons, and rules of the Supreme Court were made

(1) [1895] P. 276, 346. (2) (1885) 14 Q. B. D. 859.

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which somewhat modified the old rule as to non-recovery of costs by a successful litigant suing in formâ pauperis.

By Order XVI., Rule 31B (1), the court or a judge was authorized to certify for profit costs (excluding fees to counsel) if the person ordered to pay costs to a poor person had acted unreasonably in prosecuting or defending or opposing the proceedings. This rule has been modified from time to time and in 1935 the present rules were made. It appears to me, therefore, that since 1914 the rules have departed to some extent from the old common law rule that since no profit costs are payable by a poor person no order for profit costs can be made in his favour, but apart from such departure the principle of the old common law still remains good, as laid down in *Carson* v. *Pickersgill.* (2) I come back, therefore, to the question as to whether there are in this case special circumstances which require an order for profit costs to be made against the co-respondent. The only possible ground is that the co-respondent has means to pay, and that, therefore, justice requires that the solicitor for the poor person shall receive some remuneration for his voluntary and honourable services. I do not think such a ground is a special circumstance requiring profit costs to be given. I, therefore, condemn the co-respondent in the costs of the petitioner and make no special order as to costs. I should like to take this opportunity of expressing my appreciation of the efficient and valuable work done by counsel and solicitors in this case, and in many other cases conducted in this Court on behalf of poor persons. They receive no financial compensation whatever, and often do the work at considerable personal inconvenience, but the standard of their work does not appear to suffer in consequence.

Solicitors: *Milner & Bickford; H. N. & E. H. Philcox & Co.*

(1) Annual Practice, 1915, 266; Cf. Annual Practice, 1914, 259. Rule 29.
(2) 14 Q. B. D. 859.

R. M. M.

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